described in paragraph (c) of this section.

By order of the Board of Directors.

Dated at Washington, DC, this 13th day of March, 1990.

Federal Deposit Insurance Corporation.

Hoyle L. Robinson,

Executive Secretary.

[FR Doc. 90–6327 Filed 3–20–90; 8:45 am]

BILLING CODE 6714-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Social Security Administration

20 CFR Part 416

RIN 0960–AC47

[Regulation No. 16]

Supplemental Security Income for the Aged, Blind, and Disabled; Real Property Which Is Not Counted When It Cannot Be Sold and Transfer of Assets for Less Than Fair Market Value

AGENCY: Social Security Administration, HHS.

ACTION: Final rule.

SUMMARY: These regulations, under the Supplemental Security Income (SSI) program, reflect sections 9103 and 9104 of Public Law 100–203 (the Omnibus Budget Reconciliation Act of 1987) dealing with the disposition and transfer of resources in determining eligibility for SSI benefits. Both provisions were effective April 1, 1988. We are also amending regulations to implement sections 303 (c) and (g)(3) of Public Law 100–360 (the Medicare Catastrophic Coverage Act of 1988) which repealed the statutory provision regarding treatment, for SSI purposes, of resources transferred for less than fair market value. This repeal only applies to transfers which occur on or after July 1, 1988. The effect of these regulations is to liberalize our policies in determining SSI benefits by not requiring the sale or transfer of real property under certain conditions.

EFFECTIVE DATE: These rules are effective on March 21, 1990.

FOR FURTHER INFORMATION CONTACT: Duane Heaton, Legal Assistant, Office of Regulations, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235, telephone (301) 965–8470.

SUPPLEMENTARY INFORMATION: Regulations implementing section 9103 and 9104 of Public Law 100–203, were published as interim rules in the **Federal Register** on April 22, 1988 (53 FR 13254). Several comments were received and are answered later in this preamble to the regulations.

Under existing provisions of title XVI of the Social Security Act (the Act), the resources that an individual owns, with certain exceptions, are counted in determining an individual's eligibility for SSI. Sections 9103 and 9104 of the Omnibus Budget Reconciliation Act of 1987, Public Law 100–203, made certain changes to the statutory resource provisions.

These final regulations also affect applicants for and recipients of the Medical Assistance Program (Medicaid) under title XIX of the Act. The purpose of the Medicaid program is to provide assistance to States for payments of Medical Assistance on behalf of individuals with low income, including cash assistance recipients and, in certain States, other medically needy, who, except for income and resources, would be eligible for cash assistance. The program is funded from general revenues.

Section 9103

Section 9103 amended section 1613(b) of the Act to add a new paragraph (2) which provides that notwithstanding the provisions of paragraph (1) (the conditional payment provision of section 1613(b)) the sale of real property shall not be required for so long as the property cannot be sold because: (1) It is jointly owned and its sale would cause undue hardship due to loss of housing for the other owner(s); (2) its sale is barred by a legal impediment; or (3) as determined by regulations issued by the Secretary, the owner's reasonable efforts to sell it have been unsuccessful. These statutory changes were effective April 1, 1988.

Loss of Housing for Joint Owner

Under regulations in effect prior to the publication on April 22, 1988, of the interim rules implementing section 9103 of Public Law 100–203, if an individual had the legal right to sell property jointly owned with another, we considered the property to be a countable resource to the individual. There was no provision in the regulations for waiving the requirement to dispose of excess resources in the form of real property on the basis of undue hardship to a co-owner. An individual who owned excess nonliquid resources (real or personal) could not receive regular SSI benefits, but could receive time-limited benefits conditioned on the agreement to dispose of the property; in return, we did not consider the excess property in determining the individual's eligibility for SSI benefits subject to repayment of the benefits received from the proceeds of the disposition.

Under these final regulations, as under the interim rules, we will not count excess real property as a resource for conditional benefits purposes for so long as:

- It is jointly owned; and
- Sale of the property would cause the other owner undue hardship due to loss of housing. We are defining undue hardship as occurring when the property serves as the principal place of residence for one (or more) of the other owners; sale of the property would result in loss of that residence; and no other housing would be readily available for the displaced other owner (e.g., the other owner does not own another house that is legally available for occupancy.) However, if undue hardship ceases to exist, the value of the eligible individual's interest in the property will be included in his or her countable resources effective with the month following the month the hardship ceased.

Sale Barred by Legal Impediment

Although the Act does not define "resources" for SSI purposes, regulations at 20 CFR 416.1201 have contained the same basic definition since the beginning of the program. Under these regulations, resources are (in addition to cash and liquid assets) any real or personal property that an individual owns and could convert to cash to be used for his or her support and maintenance. If an individual has the right, authority, or power to liquidate property, or his or her share of the property, it is considered a resource. Conversely, if an individual does not have the right, authority, or power to liquidate property (e.g., there is a legal impediment to its sale), the property is not considered a resource at all. Accordingly, since this statutory amendment which added section 1613(b)(2)(B) reflects current policy, no regulatory change is required to implement it.

Reasonable Efforts To Sell

Regulations in effect prior to the publication of interim rules on April 22, 1988, at § 416.1240(c) provided that, if an individual failed to dispose of excess real property within 6 months (or 9 months if there is good cause for an extension), regardless of the efforts made to dispose of it, we counted the property for SSI purposes and the individual was ineligible for benefits. In counting the resource, we used the

original estimate of current market value (i.e., the estimate which resulted in the determination of excess resources and led to the individual's choice of conditional benefits) unless the individual submitted evidence establishing a lower value. The value estimate applied retroactively to the beginning of the conditional benefits period. The resultant overpayment calculated under the original estimate of current market value, or the revised estimate if there was one, had to be refunded.

Like the interim rules, these final regulations at § 416.1245 provide that we will not consider excess real property in an individual's countable resources for so long as the owner's reasonable efforts to sell it have been unsuccessful. The basis for our determining whether efforts to sell are reasonable, as well as unsuccessful, is the conditional benefits period. The conditional benefits period for real property was revised in the interim rules to 9 months which parallels the prior 6-month basic disposal period plus 3-month extension granted for good cause. We chose 9 months for the conditional payment period for real property since that was the maximum period previously allowed for disposing of real property. We believe it is reasonable to use this maximum disposition period to evaluate the reasonableness of the individual's efforts to sell. We believe this requirement of a conditional payment period is provided for under section 1613(b)(2)(C) of the Act, which authorizes the Secretary to determine by regulation whether the owner has been making reasonable efforts to sell which have been unsuccessful. We believe it is reasonable first to require an individual to enter into a conditional payment agreement and attempt to sell excess real property because section 9103 and its legislative history (H.R. Rep. No. 495, 100th Cong., 1st Sess. 822–23 (1987)) do not suggest that conditional payments should not first be required in order for real property not to be included in countable resources. Rather, they merely provide that once reasonable efforts have been demonstrated (as defined by the Secretary in regulations), and such efforts have proven unsuccessful, the individual's eligibility for SSI benefits is no longer conditioned upon the disposal of the individual's property; instead, the property will not be counted as a resource and the individual will be eligible for SSI benefits for so long as he or she continues reasonable efforts to sell. Until such time as reasonable efforts to sell are determined to be unsuccessful, we will condition benefits on the disposition of the property pursuant to section 1613(b)(1). If we determine that reasonable efforts to sell have been unsuccessful, further SSI payments will not be subject to repayment if the property is ever sold; only the 9 months' conditional benefits will be subject to recovery.

Under these final regulations, a conditional benefits period involving excess real property begins as described at § 416.1242(a). The conditional benefits period ends at the earliest of the following:

- Sale of the property;
- Lack of continued reasonable efforts to sell;
- The individual's written request for cancellation of the agreement;
- Countable resources, even without the conditional exclusion, fall below the applicable limit (e.g., liquid resources have been depleted); or
- The 9 months of conditional benefits have been paid.

In addition, these regulations specify that reasonable efforts to sell property consist of taking all necessary steps to sell it in the geographic area covered by the media serving the area in which the property is located. (As under current policy, the asking price is to be no higher than the latest estimate of current market value.) More specifically, making a reasonable effort to sell would mean that:

- Except for gaps of no more than 1 week, an individual must attempt to sell the property by listing it with a real estate agent or by undertaking to sell it personally;
- Within 30 days of signing a conditional benefits agreement, and absent good cause for not doing so, the individual must have:

Listed the property with an agent; or

Begun to advertise it in at least one of the appropriate local media, placed a "For Sale" sign on the property (if permitted), begun to conduct "open houses", or otherwise show the property to interested parties on a continuous basis, and attempted any other appropriate methods of sale; and

- The individual does not decline any reasonable offer to buy and accepts the burden of demonstrating that when an offer is rejected it is because the offer was not reasonable. We are requiring the individual to submit additional evidence of why an offer of at least two-thirds of the latest current market value was not accepted in order to permit the rejection of frivolous offers and still account for changing market conditions.

We will contact the individual periodically to verify the existence of reasonable efforts to sell. For so long as the individual is making reasonable efforts to sell, the property in question is not counted as a resource. Should the individual cease his reasonable efforts to sell, the property is countable effective with the month following cessation of such efforts.

These final regulations, like the interim rules, include a definition of good cause to encompass situations where circumstances beyond an individual's control prevent taking the required action to accomplish "reasonable efforts to sell."

In applying this reasonable efforts to sell provision, an individual who has received 9 months of conditional benefits and whose benefits have been suspended as described at § 416.1321 for reasons unrelated to the property not counted under the conditional benefits agreement, but whose eligibility has not been terminated as defined at §§ 416.1331 through 416.1335, can continue to have the excess real property not included in countable resources upon reinstatement of SSI payments if reasonable efforts to sell the property resume within 1 week of reinstatement. Such an individual will not have to go through a subsequent conditional benefits period.

If a conditional benefits period is in effect when an individual's benefits are suspended for reasons unrelated to reasonable efforts to sell, the 9-month conditional benefits/evaluation period will not include any months for which benefits were suspended. While we stated this policy in the preamble to the interim rules published April 22, 1988, for clarity the regulations at § 416.1242 are being amended in these final rules to include this information. When the suspension has ended, the remainder of the 9-month period will begin to run. However, an individual whose eligibility has been terminated as defined at §§ 416.1331 through 416.1335 and who subsequently reapplies would be subject to a new conditional benefits period if he or she still owns excess real property. This requirement for a new conditional benefits period is based on the fact that in the termination situation the individual will be proceeding with a new application while in the suspension situation the original application is still in effect. This approach is consistent with the statutory distinction between suspension and termination (section 1631(e) of the Act) as well as with our longstanding administrative distinction between those situations.

Section 9104

Section 9104 of Public Law 100–203 amended section 1613(c) of the Act by

adding a new paragraph (4). That paragraph requires that the Secretary, by regulation, provide for suspending the application of the transfer of assets provision of section 1613(c)(1) of the Act in any instance that the Secretary determines that such suspension is necessary to avoid undue hardship. These statutory changes were effective April 1, 1988.

Section 1613 (c)(1) through (3) of the Act, prior to amendment by section 303 of Public Law 100–360 as discussed below, required counting as a resource the uncompensated value of an asset which an eligible individual (or eligible spouse) owned and has given away or sold for less than fair market value. If the individual could present convincing evidence that the transfer occurred exclusively for a reason other than establishing eligibility for SSI and/or Medicaid benefits, then the uncompensated value will not be counted. Otherwise, the uncompensated value would be counted as a resource for 24 months from the date of transfer, even if the transfer occurred prior to filing for benefits. Prior to the enactment of Public Law 100–203, there was no provision for waiver of the counting requirement in situations where application of the transfer of assets rule resulted in undue hardship.

Under these final regulations, we will:

- Suspend counting the uncompensated value of the transferred resource for any month in the statutory 24-month period where such counting would cause the individual undue hardship;
- Resume counting the uncompensated value for any month of the 24-month period remaining for which counting would not cause undue hardship; and
- Make no change in the way the 24-month period is determined when counting is suspended for 1 or more months.

Undue hardship will be found to exist when: (1) An individual alleges that failure to receive SSI benefits would deprive him or her of food or shelter; and (2) the applicable Federal benefit rate (plus the federally-administered State supplementary payment level) exceeds the sum of: The individual's monthly countable and excludable income and monthly countable and excludable liquid resources.

These final rules regarding undue hardship apply only on or after April 1, 1988, the effective date of section 9104, and to transfers made prior to July 1, 1988, since section 303 (c) and (g)(3) of Public Law 100–360 (the Medicare Catastrophic Coverage Act of 1988) deleted section 1613(c) of the Act transfers occurring on or after July 1, 1988. Section 1613(c) had required that the uncompensated value of resources transferred at less than fair market value within the preceding 24 months be counted toward the SSI resource limit. Therefore, we are amending § 416.1246 to provide that the section only applies to transfers which occurred prior to July 1, 1988, and that paragraphs (d)(2) and (d)(3) of that section regarding undue hardship apply to such transfers for the months beginning on or after April 1, 1988.

Justification for Dispensing With Rulemaking Procedures

We are publishing amendments to the regulations implementing section 303 (c) and (g)(3) of Public Law 100–360 as final rules instead of proposed rules.

The Department, even when not required by statute, as a matter of policy, generally follows the Administrative Procedure Act (APA) notice of proposed rulemaking and public comment procedures specified in 5 U.S.C. 553 in the development of its regulations. The APA provides exceptions to its notice and comment procedures when an agency finds there is good cause for dispensing with such procedures. Section 553(b)(3)(B) of the APA exempts application of notice and comment rulemaking procedures "when the agency for good cause finds * * * that notice and public procedures thereon are impracticable, unnecessary, or contrary to the public interest." We are dispensing with notice and comment rulemaking in the case of these rules because such rulemaking is unnecessary since this change merely conforms the regulation to the controlling statute, does not involve administrative discretion, and does not independently affect the rights of claimants.

Public Comments and Responses to Interim Rules Published in the Federal Register April 22, 1988 (53 FR 13254)

We received comments from two law centers and two State departments for human/social services. A summary of the comments from the four commenters and our responses follow:

Jointly Owned Property

Comment: When property becomes a countable resource because the joint owner will no longer suffer undue hardship if the property is sold, a conditional period of eligibility should be triggered.

Response: Should a previously excluded jointly owned property become a countable resource, the individual will be given the option of a conditional benefits period if he or she meets the necessary requirements.

Comment: Two commenters state that defining the joint owner's undue hardship in terms of the legal availability of other housing may be too restrictive an interpretation. The Social Security Administration (SSA) should take a practical approach and consider all factors when making an undue hardship determination.

Response: The commenters appear to have misconstrued the example of "legal availability" as being the only condition for determining the availability of other housing. SSA intends to consider all factors peculiar to a joint owner's situation when making an undue hardship determination. The intent of the regulation is to prevent hardship from being found in situations where individuals with multiple properties available for occupancy simply choose not to move elsewhere.

Reasonable Effort To Sell

Comment: The rules to establish reasonable efforts to sell are too difficult and costly.

Response: The requirement to advertise in the local media can be met easily and inexpensively by circulating handwritten fliers or advertising through community bulletin boards.

Comment: Expand the definition of good cause to include situations where:

- Expert opinion or past experience indicates no market for the property; or
- The property cannot be marketed due to the individual's age, illness, indigence, lack of proximity to the property, or lack of realtor interest.

Response: Section 416.1245(b)(4) of the regulations already covers the factors requested by the commenter by permitting a finding of "good cause" whenever an individual was prevented from taking steps to sell excess real property by circumstances beyond his or her control. For example, good cause could be found when illness prevents an individual from taking the necessary steps within the prescribed timeframes to establish reasonable efforts to sell.

Comment: When determining whether an individual has received a reasonable offer for the property, SSA should use a figure of 80 percent rather than two-thirds of estimated market value.

Response: We believe that the two-thirds figure is reasonable and conforms with the intent of the legislation to not count as a resource property that cannot be sold. The effect of using a higher figure would be to maintain SSI payments while an individual owns property which can presumably be sold at a reasonable amount, the converse of

the legislation's intent. In addition, the regulation permits an individual to demonstrate the unreasonableness of the two-thirds figure, e.g., the individual has another contract pending for 85 percent of market value but the deal has not yet been closed.

Reasonable Efforts to Sell/Conditional Benefits Period

Comment: Section 9103 of Public Law 100–203 does not mention conditional eligibility. Reconsider using a conditional benefits period as the means of determining real property that cannot be sold since individuals may be prevented from being eligible for Medicaid benefits.

Response: Section 9103 amended section 1613(b) of the Act, which authorizes the Secretary to prescribe conditions under which various kinds of property must be disposed of in order not to be included in determining eligibility. Congress provided, in section 9103, the link between the conditional benefits period and the determination that an individual's reasonable efforts to sell real property have been unsuccessful. Consequently, it is reasonable to require the individual to enter into a conditional payment agreement and attempt to sell excess real property prior to determining that such efforts have proven unsuccessful, and that SSI eligibility is no longer conditioned upon disposal of the property.

The application of section 9103 solely to the receipt of conditional payments does not prevent the State from applying a reasonable effort to sell rule to its medical assistance only population. It is true that section 9103 is only applicable in the SSI program to conditional payments, and so is not generally applicable under Medicaid. However, section 303(e) of the Medicare Catastrophic Coverage Act of 1988 (Pub. L. 100–360) added to title XIX of the Act a new section 1902(r)(2). This new section provides that States may use eligibility criteria which are more liberal, but not more restrictive, than the cash assistance programs' criteria. This section applies to all eligibility groups with the exception of actual cash assistance recipients and certain deemed groups. Thus, under section 1902(r)(2) of the Act a State can, it if wishes, adopt a reasonable effort to sell policy similar to that in section 9103 and apply it to the State's medical assistance only population.

Notice

Comment: SSA should provide detailed written notice of a person's obligations regarding reasonable efforts to sell.

Response: SSA fully intends to provide claimants with written notice of their obligations regarding reasonable efforts to sell. As always, SSA field employees are also available to answer questions on this subject.

"Undue Hardship" Exception to the Transfer of Assets Penalty

Comment: Because of the catastrophic health care legislation, the transfer of assets penalty should be eliminated for all SSI recipients as of July 1, 1988.

Response: That recent legislation repeals the penalty with respect to all property transferred on or after July 1, 1988, but does not eliminate the penalty for property transferred prior to that date. It is beyond the Secretary's authority under title XVI to extend the repeal to transfers made prior to July 1, 1988.

Effective Dates

Comment: The regulations should state that its provisions are effective April 1, 1988, for all SSI cases and not April 22, 1988, the date of publication.

Response: Although the regulations were published April 22, 1988, they provide the policy for implementing sections 9103 and 9104 of Public Law 100–203, which have an effective date for all SSI cases of April 1, 1988.

Transfer of Assets

Comment: The inclusion of excludable income and liquid resources in the definition of undue hardship contravenes the statutory and regulatory scheme of SSI eligibility.

Response: We believe that inclusion of excludable income and liquid resources to determine undue hardship is consistent with the SSI program. Consistent with the program's purpose to provide a minimum amount to meet certain needs, the test of hardship should reflect the person's ability to meet his immediate basic needs for food, clothing, and shelter without benefit of SSI monies. Since excludable income and liquid resources are available to the person for such purposes, they should be considered when determining if hardship exists. The Federal benefit rate (and any appropriate State supplementation) is used as the test for determining hardship because Congress (and the respective State legislature) has declared that rate to be the minimum amount needed to obtain those basic needs.

Regulatory Procedures

Executive Order 12291

The Secretary has determined that this is not a major rule under Executive Order 12291 since the program and administrative costs of these regulations will be insignificant and the threshold criteria for a major rule are not otherwise met. Therefore, a regulatory impact analysis is not required.

Paperwork Reduction Act

These regulations impose no additional reporting and recordkeeping requirement subject to Office of Management and Budget clearance.

Regulatory Flexibility Act

We certify that these regulations will not have a significant economic impact on a substantial number of small entities because these rules affect only individuals and States. Therefore, a regulatory flexibility analysis as provided in Public Law 96–354, the Regulatory Flexibility Act, is not required.

(Catalog of Federal Domestic Assistance Program No. 13.807, Supplementary Security Income Program)

List of Subjects in 20 CFR Part 416

Administrative practice and procedure, Aged, Blind, Disability benefits, Public assistance programs, Supplemental security income.

Dated: November 7, 1989.

Gwendolyn S. King,

Commissioner of Social Security.

Approved: December 12, 1989.

Louis W. Sullivan,

Secretary of Health and Human Services.

Accordingly, the interim rule amending 20 CFR part 416, subpart L, which was published at 53 FR 13254 on Friday, April 22, 1988, is adopted as a final rule with the following changes:

PART 416—SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND, AND DISABLED

Subpart L—Resources and Exclusions

1. The authority citation for subpart L of part 416 continues to read as follows:

Authority: Secs. 1102, 1602, 1611, 1612, 1613, 1614(f), 1621 and 1631 of the Social Security Act; 42 U.S.C. 1302, 1381a, 1382, 1382a, 1382b, 1382c(f), 1382j and 1383; sec. 211 of Pub. L. 93–66, 87 Stat. 154.

2. Section 416.1242 is amended by revising paragraphs (a) and (b) and adding paragraph (d) to read as follows:

§ 416.1242 Time limits for disposition of resources.

(a) In order for payment conditioned on the disposition of nonliquid resources to be made, the individual must agree in writing to dispose of real property within 9 months and personal property within 3 months. The time period will begin on the date the written agreement to dispose of the resources is signed by the individual and submitted to us. However, in the case of an individual who is disabled, the time period will begin with the date the individual is determined to be disabled.

(b) The 3-month time period for disposition of personal property will be extended an additional 3 months where it is found that the individual had "good cause" for failing to dispose of the resources within the original time period. The rules on the valuation of real property not disposed of within 9 months are described in § 416.1245(b).

* * * * *

(d) In determining whether the appropriate time limits discussed in paragraphs (a) and (b) of this section have elapsed, no month will be counted for which an individual's benefits have been suspended as described in § 416.1321, provided that the reason for the suspension is unrelated to the requirements in § 416.1245(b) and that the individual's eligibility has not been terminated as defined in §§ 416.1331 through 416.1335.

3. Section 416.1245 is revised to read as follows:

§ 416.1245 Exceptions to required disposition of real property.

(a) *Loss of housing for joint owner.* Excess real property which would be a resource under § 416.1201 is not a countable resource for conditional benefit purposes when: it is jointly owned; and sale of the property by an individual would cause the other owner undue hardship due to loss of housing. Undue hardship would result when the property serves as the principal place of residence for one (or more) of the other owners, sale of the property would result in loss of that residence, and no other housing would be readily available for the displaced other owner (e.g., the other owner does not own another house that is legally available for occupancy). However, if undue hardship ceases to exist, its value will be included in countable resources as described in § 416.1207.

(b) *Reasonable efforts to sell.* (1) Excess real property is not included in countable resources for so long as the individual's reasonable efforts to sell it have been unsuccessful. The basis for determining whether efforts to sell are reasonable, as well as unsuccessful, will be a 9-month conditional benefits period described in § 416.1242. If it is determined that reasonable efforts to sell have been unsuccessful, further SSI payments will not be conditioned on the disposition of the property and only the 9 months of conditional benefits will be subject to recovery. In order to be eligible for payments after the conditional benefits period, the individual must continue to make reasonable efforts to sell.

(2) A conditional benefits period involving excess real property begins as described at § 416.1242(a). The conditional benefits period ends at the earliest of the following times:

(i) Sale of the property;

(ii) Lack of continued reasonable efforts to sell;

(iii) The individual's written request for cancellation of the agreement;

(iv) Countable resources, even without the conditional exclusion, fall below the applicable limit (e.g., liquid resources have been depleted); or

(v) The 9 months of conditional benefits have been paid.

(3) Reasonable efforts to sell property consist of taking all necessary steps to sell it in the geographic area covered by the media serving the area in which the property is located, unless the individual has good cause for not taking these steps. More specifically, making a reasonable effort to sell means that:

(i) Except for gaps of no more than 1 week, an individual must attempt to sell the property by listing it with a real estate agent or by undertaking to sell it himself;

(ii) Within 30 days of signing a conditional benefits agreement, and absent good cause for not doing so, the individual must:

(A) List the property with an agent; or

(B) Begin to advertise it in at least one of the appropriate local media, place a "For Sale" sign on the property (if permitted), begin to conduct "open houses" or otherwise show the property to interested parties on a continuous basis, and attempt any other appropriate methods of sale; and

(iii) The individual accepts any reasonable offer to buy and has the burden of demonstrating that an offer was rejected because it was not reasonable. If the individual receives an offer that is at least two-thirds of the latest estimate of current market value, the individual must present evidence to establish that the offer was unreasonable and was rejected.

(4) An individual will be found to have "good cause" for failing to make reasonable efforts to sell under paragraph (b)(3) of this section if he or she was prevented by circumstances beyond his or her control from taking the steps specified in paragraphs (b)(3)(i) through (ii) of this section.

(5) An individual who has received 9 months of conditional benefits and whose benefits have been suspended as described at § 416.1321 for reasons unrelated to the property excluded under the conditional benefits agreement, but whose eligibility has not been terminated as defined at §§ 416.1331 through 416.1335, can continue to have the excess real property not included in countable resources upon reinstatement of SSI payments if reasonable efforts to sell the property resume within 1 week of reinstatement. Such an individual will not have to go through a subsequent conditional benefits period. However, the individual whose eligibility has been terminated as defined as §§ 416.1331 through 416.1335 and who subsequently reapplies would be subject to a new conditional benefits period if there is still excess real property.

4. Section 416.1246 is amended by revising paragraphs (d) and (f) to read as follows:

§ 416.1246 Disposal of resources at less than fair market value.

* * * * *

(d)(1) *Uncompensated value—General.* The uncompensated value is the fair market value of a resource at the time of transfer minus the amount of compensation received by the individual (or eligible spouse) in exchange for the resource. However, if the transferred resource was partially excluded, we will not count uncompensated value in an amount greater than the countable value of the resources at the time of transfer.

(2) *Suspension of counting as a resource the uncompensated value where necessary to avoid undue hardship.* We will suspend counting as a resource the uncompensated value of the transferred asset for any month in the 24-month period if such counting will result in undue hardship. We will resume counting the uncompensated value as a resource for any month of the 24-month period in which counting will not result in undue hardship. We will treat as part of the 24-month period any months during which we suspend the counting of uncompensated value.

(3) *When undue hardship exists.* Undue hardship exists when:

(i) An individual alleges that failure to receive SSI benefits would deprive the individual of food or shelter; and

(ii) The applicable Federal benefit rate (plus the federally-administered State

supplementary payment level) exceeds the sum of: The individual's monthly countable and excludable income and monthly countable and excludable liquid resources.

* * * * *

(f) *Applicability.* This section applies only to transfers of resources that occurred before July 1, 1988. Paragraphs (d)(2) and (d)(3) of this section, regarding undue hardship, are effective for such transfers on or after April 1, 1988.

[FR Doc. 90-6198 Filed 3-20-90; 8:45 am]
BILLING CODE 4190-11-M

Food and Drug Administration

21 CFR Parts 610 and 640

[Docket No. 88N-0433]

Blood and Blood Products; Amendment To Allow for Alternative Procedures; Removal of a Labeling Requirement

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the biologics regulations governing the collection and manufacture of blood, blood components, and blood products by allowing these products to be licensed, collected, processed, tested, stored, and distributed in ways alternative to those specified in the biologics regulations upon approval by the Director, Center for Biologics Evaluation and Research (CBER). FDA is also amending its regulations to remove a labeling requirement applicable to injectable products prepared from human blood, plasma, or serum. The agency is taking these actions to provide the flexibility needed to accommodate rapid changes in biotechnology and to assure the continued availability of blood and blood products.

DATES: Effective March 21, 1990. For changing the labeling of injectable products prepared from human blood, licensed establishments should submit draft labeling before July 19, 1990. For blood products initially manufactured for interstate distribution on or after March 21, 1991, the products shall be labeled consistent with this final rule.

ADDRESSES: Draft revised labeling should be sent to the Director, Center for Biologics Evaluation and Research (HFB-240), Food and Drug Administration, 8800 Rockville Pike, Bethesda, MD 20892. Requests to allow alternative procedures or criteria should be sent to the Director, Center for Biologics Evaluation and Research (HFB-1), Food and Drug Administration, 8800 Rockville Pike, Bethesda, MD 20892.

FOR FURTHER INFORMATION CONTACT: Andrea Chamblee, Center for Biologics Evaluation and Research (HFB-130), Food and Drug Administration, 8800 Rockville Pike, Bethesda, MD 20892, 301-295-8188.

SUPPLEMENTARY INFORMATION:

I. Introduction

In the **Federal Register** of July 18, 1989 (54 FR 30093), FDA proposed to revise the current biologics regulations that prescribe test methods and manufacturing processes for licensed biological products related to the safety, purity, potency, and effectiveness of the products. In the July 18, 1989, proposal, FDA proposed that blood, blood components, and blood products may be licensed, collected, tested, stored, and distributed in ways alternative to those specified in these biologics regulations, upon approval of the Director, CBER. FDA also proposed to remove a labeling requirement that a biological product prepared from human blood, plasma, or serum include in the labeling a statement that the product was prepared from blood that was nonreactive when tested for hepatitis B surface antigen.

II. Alternative Procedures

In the **Federal Register** of July 18, 1989, FDA proposed to amend the current biologics regulations to add § 640.120 Alternative Procedures to provide that blood, blood components, and blood products may be licensed, collected, tested, labeled, stored, and distributed in ways alternative to those specified in the biologics regulations, only upon approval of the Director, CBER.

Provisions applicable to blood, blood components, or blood products appear in title 21, chapter I, subchapter F of the Code of Federal Regulations (CFR). For example, the additional standards in 21 CFR part 640 apply specifically to various blood, blood components, and blood derivative products. The provisions of 21 CFR part 606 detail current good manufacturing practice requirements (CGMP's) for blood and blood components. 21 CFR part 610 also contains requirements applicable to blood and blood products.

FDA recognizes that as technology and scientific knowledge advance, and the demands placed on the blood industry change, there will continue to be instances when a regulation will become outdated or where unanticipated circumstances may warrant a departure from an approach detailed in the regulations. In order to be more responsive to improved technologies, increased scientific knowledge, and concerns about the continued availability of blood and blood products, the Director, CBER, should have the clear authority to approve alternatives to particular regulatory requirements when adequate information is available to support the alternatives.

FDA regulations already provide for the use of alternative procedures or criteria in some circumstances, for example, §§ 640.75, 606.110, and 610.9. However, these regulations do not necessarily apply to all aspects of licensing, collecting, processing, testing, storing, and distributing blood, blood components, and blood products. Under § 640.120, as revised, the Director, CBER, may approve an exception or alternative to the requirements in the biologics regulations applicable to blood, blood components, or blood products. The Director would approve such exception or alternative only if, in the judgment of the Director, the safety, purity, potency, and effectiveness of the final product is adequately assured. The Director, CBER, may request additional data or information from the person who has requested permission for an exception or alternative before granting the request.

Under § 640.120, requests for exceptions or alternatives should be in writing; however, oral requests and approvals would be permitted on rare occasions if necessary because of time restraints. The requester must submit written confirmation of the oral request immediately afterwards. Oral approval will also be confirmed in writing, after receipt of the written request. Whether the approval is given in writing or orally, the approval must be obtained prior to distribution of any affected blood, blood component, or blood product. For blood, blood components, or blood products where distribution has begun, the distribution may not continue unless approval has been obtained.

Because revised § 640.120 can be used in all circumstances for which alternative procedures under § 640.75 may be granted, FDA is removing § 640.75. Blood establishments granted an alternative procedure under § 640.75 will not be required to reapply for the same alternative procedure under § 640.120. However, a prospective alternative procedure differing from the previously approved alternative procedure will require approval pursuant to § 640.120.

FDA notes that the final rule will apply to both licensed and registered unlicensed establishments. However, a registered unlicensed establishment may be required to submit more information than a licensed establishment in support of an alternative procedure. Each licensed establishment has on file with FDA, under its establishment and product licenses, a description of the facilities and significant procedures used in the manufacture of each licensed product. Each licensed establishment must also promptly report to FDA significant changes in the facilities, personnel, or procedures concerning a licensed product (see 21 CFR 601.12). Thus, FDA will have additional information in the establishment's license that can be reviewed when considering a request for an alternative procedure and can thereafter better monitor the procedures of the establishment, including any changes occurring after the alternative procedure has been approved. Indeed, most requests for alternative procedures from licensed establishments will be treated by FDA as a request for an amendment to the establishment's license.

With a registered unlicensed blood establishment, FDA will not have the benefit of the additional information that would be available in a license file, nor would the agency have the ability to monitor continually the procedures of the establishment equivalent to its ability to monitor a licensed establishment. Therefore, many requests for alternative procedures by unlicensed establishments may require the submission of additional information and, in some cases, alternative procedures may be approvable only for licensed establishments.

III. Labeling Removal

Part 610 of title 21 of the Code of Federal Regulations (21 CFR part 610) provides general standards for the processing, testing, and labeling of biological products. Section 610.61 prescribes requirements for the labeling of biological products.

Under § 610.61(s), FDA required that the package label for injectable products prepared from human blood, plasma, or serum contain a statement that the product was prepared from blood that was found nonreactive when tested for hepatitis B surface antigen (HBsAg). Injectable products prepared from blood or blood components include fractionation products such as Albumin (Human), Plasma Protein Fraction (Human), Antihemophilic Factor (Human), and various immunoglobulin products. Section 610.61(s) did not apply to blood or blood components intended for transfusion or plasma for further manufacturing use.

The purpose of product labeling is to provide the user of the product with information necessary for its safe and effective use. FDA believes that the labeling statement required by § 610.61(s) only reaffirms that the final product adheres to Federal requirements, and the statement does not provide information necessary for the product's proper use. Therefore, FDA is revising the regulations to remove this requirement.

This change does not affect the requirement, under § 610.40(a), that each donation of blood, plasma, or serum to be used in preparing a biological product must be tested for the presence of HBSAg. Blood, plasma, or serum that is reactive when tested for HBsAg, ordinarily may not be used in manufacturing a biological product except under limited circumstances provided in § 610.40(d).

Under the revision, FDA labeling requirements will be consistent with other current requirements for the labeling of fractionation products. The results of other tests required by Federal regulation, such as the test for antibody to human immunodeficiency virus, type 1 (HIV–1) or a serologic test for syphilis, are not required to be included in the product labeling. Therefore, FDA believes that the requirement for the labeling statement concerning hepatitis B testing should be removed because the requirement is not useful and is unnecessarily burdensome and because the requirements for labeling concerning required tests should be consistent.

Upon the effective date of this final rule, the labeling statement concerning HBsAg testing will no longer be required. FDA is requiring that the labeling statement be removed from the labeling accompanying any biological product manufactured for interstate commerce 1 year from the effective date of this final rule.

IV. Comments

FDA provided interested persons 60 days to submit written comments on the July 18, 1989, proposed rule. In response to the proposed rule, FDA received four letters of comment. The comments generally supported the proposed rule. A summary of the comments and FDA's responses follow.

A. Public Notification of Approved Alternative Procedures and Exceptions

1. Two comments on proposed § 610.120 suggested that, in addition to the implementing procedures described in the proposed rule, the agency should publish notice of approvals of alternative procedures and exceptions in the **Federal Register.**

The agency agrees that, in general, information regarding approved alternative procedures and exceptions should be available to the public. Such notice would provide information for other manufacturers who may wish to apply for a similar alternative procedure or exception. FDA will periodically publish a notice in the **Federal Register** providing a list of alternative procedures and exceptions granted since the last notice. Initially, FDA will publish such a notice every 6 months, but the interval for such notices may be changed as FDA deems appropriate.

Occasionally, FDA may determine that an alternative procedure or exception may be appropriate for use by a number of establishments in the blood industry. In such a case, FDA may issue a memorandum to the blood establishments describing the criteria and information necessary to obtain approval of such an alternative procedure or exceptions. A copy of the memorandum will be filed for public review at the Dockets Management Branch, Food and Drug Administration, Rm. 6–62, 5600 Fishers Lane, Rockville, MD 20857, and would be identified in the next **Federal Register** notice of alternative procedure and exception approvals. Thereafter, individual approvals of alternative procedures and exceptions granted according to the terms of the memorandum would no longer be listed in the **Federal Register** notice of alternative procedure and exception approvals.

In order to assure that the public is aware that the information regarding approval of alternative procedures and exceptions will be available, FDA is adding new § 640.120(b) which provides that FDA will periodically publish a list of such approvals in the **Federal Register.** Proposed § 640.120 is redesignated as § 640.120(a) in the final rule.

The information regarding approved alternative procedures and exceptions being made available will assist potential future applicants in determining whether they may want to apply for a similar alternative procedure or exception. FDA cautions, however, that publication in the **Federal Register** does not indicate that FDA has approved the procedure or criteria for use by organizations other than the approved establishment. Prior approval of the Director, CBER, is necessary for each individual applicant unless otherwise explicitly stated. The Director's discretionary decision to

allow each alternative procedure or exception will depend on many individual factors, such as the nature of the product, the particular manufacturing process used by the applicant, or other information presented in each alternative procedure request. The Director, CBER, will approve each exception or alternative only if, in the judgment of the Director, the safety, purity, potency, and effectiveness of the final product is adequately assured.

2. One comment on proposed § 640.120 recommended that the agency provide preapproval notice of alternative procedures, and opportunity for emergency hearings.

This procedure would be inconsistent with the agency's intention to provide expeditious FDA review of alternative procedure requests. The public health will be protected by the requirement of review and approval by the Director, CBER, prior to the approval of the alternative procedure or exception. Lengthy public review procedures prior to approval of alternative procedure requests could lead to serious shortages of needed blood products. Certain blood products also have very limited expiration dating periods that could be exceeded during protracted review periods. FDA may, as appropriate, present any significant issue raised in a request for discussion with an advisory committee or at other public meetings. The suggestion is also inconsistent with other FDA regulations replaced or supplemented by this rule, that already provide for the use of alternative procedures or criteria in some circumstances without prior notice to the public. For example, alternative procedures for Source Plasma were granted without requiring prior notice.

B. Subsequent Rulemaking

3. Two comments on proposed § 640.120 requested that upon approval of an alternative procedure, FDA should simultaneously begin the process to amend existing regulations to include the procedures addressed in that alternative procedure.

An alternative procedure may be appropriate only for an individual establishment or for a specific product, and the existing regulations may remain appropriate in general for the regulation of blood and blood products. Therefore, the agency does not believe that it should necessarily amend the regulations when an alternative request procedure is granted. However, FDA will monitor the alternative procedures being approved and will propose to revise the regulations accordingly when appropriate.

C. Information Collection and Product Labeling

4. One comment on proposed § 640.120 and the proposed removal of § 640.61(s) requested that FDA establish and maintain a file of information in a readily accessible form for public dissemination which will attest to the safety of blood-derived products with respect to all potential pathogens, based upon the method of manufacture of the products. If such an information file were established, the comment anticipated that products could be labeled with the following statement: "This product has been rendered free of all pathogenic organisms through processing and/or donor screening (data on file at FDA)." The comment suggested this action would eliminate inquiries by the customer to the manufacturer regarding potential pathogens.

FDA does not agree with the comment that the agency should maintain such a public file. It remains the responsibility of the manufacturer to maintain data that establish the safety and efficacy of its products and its manufacturing process, and to provide information to its customers regarding the qualities of its products.

The suggested labeling concerning pathogenic organisms only reaffirms that the product meets Federal requirements, and, like the labeling regarding HBsAg, which is removed pursuant to this rule, the suggested statement would not provide additional information for assuring the proper use of the product.

V. Effective Date

Under 5 U.S.C. 553(d) and 21 CFR 10.40(c)(4), the effective date of a final rule may not be less than 30 days after the date of publication in the **Federal Register**, except when the regulation grants an exemption or relieves a restriction, or when the Commissioner finds good cause exists for an earlier effective date. A purpose of the final rule is to authorize FDA to consider requests to use alternative procedures where the safety, purity, and potency of the product is adequately assured, with no adverse effects on public health. The rule allows the application of new technologies or different approaches to efficient use of blood resources. The rule relieves a regulatory restriction without loss of consumer protection. Accordingly, the Commissioner has determined that there is good cause to enable the agency to consider such requests immediately, and is making the final rule effective immediately, except for the delayed effective date for labeling changes.

VI. Economic and Environmental Considerations

The agency has determined under 21 CFR 25.24(c)(10) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

The agency has examined the economic impact of this final rule and has determined that it does not require either a regulatory impact analysis, as specified in Executive Order 12291, or a regulatory flexibility analysis, as defined in the Regulatory Flexibility Act (Pub. L. 96–354).

Specifically, this rule removes an unnecessary labeling requirement. The rule also provides manufacturers of blood, blood components, and blood products an opportunity to collect, process test, and distribute their products in ways alternative to those specified in the biologics regulations, upon approval of the Director, CBER. The immediate effect of the rule allowing exceptions or alternative procedures is neutral; i.e., it neither adds nor removes requirements from the standard for blood products.

FDA cannot at this time quantify the benefits of the rule. A manufacturer, however, may benefit from the flexibility permitted under the rule by gaining FDA approval of an exception or an alternative approach that could better conserve blood resources, improve the product through the use of new technologies, or require the use of less time or resources than may be required by a method or process described in detail in the biologics regulations. The anticipated costs are insufficient to warrant designation of this final rule as a major rule under any of the criteria specified under section 1(b) of Executive Order 12291. Under section 605(b) of the Regulatory Flexibility Act, the Commissioner of Food and Drugs certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Accordingly, FDA is adopting the proposed rule, with the provision in § 640.120(b) in the final rule providing that FDA will periodically notify the public of alternative procedures that have been granted.

List of subjects

21 CFR Part 610

Biologics, Labeling, Reporting and recordkeeping requirements.

21 CFR Part 640

Blood, Labeling, Reporting and recordkeeping requirements.

Therefore, under the Public Health Service Act, and under authority delegated to the Commissioner of Food and Drugs, 21 CFR parts 610 and 640 are amended as follows:

PART 610—GENERAL BIOLOGICAL PRODUCTS STANDARDS

1. The authority citation for 21 CFR part 610 continues to read as follows:

Authority: Secs. 201, 501, 502, 503, 505, 510, 701 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 351, 352, 353, 355, 360, 371); secs. 215, 351, 352, 353, 361 of the Public Health Service Act (42 U.S.C. 216, 262, 263, 263a, 264).

§ 610.61 [Amended]

2. Section 610.61 Package Label is amended by removing paragraph (s) and by redesignating paragraph (t) as paragraph (s).

PART 640—ADDITIONAL STANDARDS FOR HUMAN BLOOD AND BLOOD PRODUCTS

3. The authority citation for 21 CFR part 640 continues to read as follows:

Authority: Secs. 201, 501, 502, 503, 505, 510, 701 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 351, 352, 353, 355, 360, 371); secs. 215, 351, 352, 353, 361 of the Public Health Service Act (42 U.S.C. 216, 262, 263, 263a, 264).

§ 640.75 [Removed]

4. Section 640.75 Alternate Procedures is removed from subpart G.

5. New subpart L consisting of § 640.120 is added to read as follows:

Subpart L—Alternative Procedures

§ 640.120 Alternative procedures.

(a) The Director, Center for Biologics Evaluation and Research, may approve an exception or alternative to any requirement in subchapter F of chapter I of title 21 of the Code of Federal Regulations regarding blood, blood components, or blood products. Requests for such exceptions or alternatives should ordinarily be made in writing. However, in limited circumstances such requests may be made orally and permission may be given orally by the Director. Oral requests and approvals must be followed by written requests and written approvals. Approval of a request for an exception or alternative must be obtained from the Director prior to the distribution of any affected blood, blood component, or blood product.

(b) FDA will publish a list of approved alternative procedures and exceptions periodically in the **Federal Register**.

Dated: January 26, 1990.

James S. Benson,

Acting Commissioner of Food and Drugs.

[FR Doc. 90-6342 Filed 3-20-90; 8:45 am]

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DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Parts 228 and 261

RIN 0596-0101

Oil and Gas Resources

AGENCY: Forest Service, USDA.

ACTION: Final rule.

SUMMARY: This rule contains newly developed procedures the Forest Service, USDA will use to accomplish the purposes of the Federal Onshore Oil and Gas Leasing Reform Act of 1987, and other applicable mineral leasing and environmental protection statutes, in offering oil and gas leases and managing the development of oil and gas resources on National Forest System lands. The Leasing Reform Act authorizes the Secretary of Agriculture to develop procedures and regulations governing leasing for oil and gas resources, including bonding and reclamation requirements, within the National Forest System. This authority was formerly exercised by the Bureau of Land Management. These regulations achieve our primary objectives of ensuring effective compliance with all applicable environmental protection statutes, as most recently construed by the Federal Courts, in conjunction with meeting the intent of Congress codified in the Leasing Reform Act. These regulations have been designed to work in coordination with similar regulations of the Department of the Interior, and to promote a cooperative process between the Federal agencies, the oil and gas industry, and members of the public who are interested in the management of Federal lands and resources.

EFFECTIVE DATE: April 20, 1990.

FOR FURTHER INFORMATION CONTACT: Stanley Kurcaba, Minerals and Geology Management Staff, Forest Service, U.S. Department of Agriculture, (703) 235-9715.

SUPPLEMENTARY INFORMATION: A proposed oil and gas leasing rule was published in the **Federal Register** on January 23, 1989 (54 FR 3326).

The proposed rule described the role the Forest Service would play in the issuance of oil and gas leases, set forth a process for approving operations on the leasehold, and established rules governing administration of operations. The proposed rule provided for a process for making decisions as to whether to authorize the Bureau of Land Management to offer National Forest System lands for leasing. The process required the use of a standard stipulation by which the Forest Service would retain the right to approve or deny operations after lease issuance. The proposed rule described the post-lease process, by which the authorized Forest officer would evaluate and make a decision on a surface use plan of operations. The proposal required the authorized Forest officer to comply with National Environmental Policy Act at both the leasing and operational stages. The proposed rule also established certain standards for the acceptable conduct of operations on National Forest System lands. In addition, the proposed rule infomed the public of the procedures the Forest Service would use to administer operations, including inspection and enforcement, and the method the Forest Service would use to fulfill its responsibilities under the Leasing Reform Act for determining whether an entity is in material noncompliance with the standards in the surface use plan of operations. Lastly, the proposed rule provided for posting of notices on future leases, applications for permits to drill, and modifications of stipulations.

Analysis of Public Comments

A 60-day comment period was provided on the proposed rule and subsequently extended for an additional 60 days in response to public request (54 FR 11969). The Forest Service received 84 letters, containing 1,034 comments. Seven types of respondents, as shown below, provided input:

Respondent type	Number of letters
Federal agencies	10
State agencies	13
Elected Federal officials (1 letter co-authored by 7 Congressmen)	1
Oil and gas industry-related institutes/associations	10
Environmental/Preservation groups	10
Businesses/Business groups	28
Individuals	12
Total	84

Responses received are available for review in the Office of the Director, Minerals and Geology Management Staff, Room 606, 1621 North Kent Street, Arlington, Virginia, during regular business hours (8 a.m. to 5 p.m.) Monday through Friday.

Many of the letters received seemed to be group efforts, using similar or identical language to identify and describe respondents' interests, concerns, and suggested modifications to the proposed rule. These letters included endorsements of other respondents' statements, sometimes including them as enclosures.

The majority of the comments concerned five provisions of the proposed rule: the determination of lands suitable for leasing; use of the standard stipulation at the lease issuance stage; compliance with the National Environmental Policy Act; processing of plans of operation, and bonding requirements. Other comments were more general in nature. Some requested technical changes for clarity or for consistency with Bureau of Land Management regulations.

It was apparent from the nature and tone of many of the comments received on the five major areas that there was considerable misunderstanding of the intent and the practical effect of the proposed rule. While many respondents were pleased that the Forest Service was promulgating regulations, some thought it was only in response to the Leasing Reform Act. They did not seem to appreciate the other statutory and legal requirements which had to be considered in the development of the regulations, even though this was explained in the preamble.

General comments. A number of comments were not specific to a particular section of the proposed rule. These are presented below with a response provided for each group.

Scope of the proposed rule. Many expressed the view that the proposed rule had gone beyond what was intended by Congress in the Leasing Reform Act and that the Forest Service was attempting to exercise authority that it had not been granted. Some said the rule was implementing provisions that Congress had specifically rejected before passage of the Leasing Reform Act, especially with respect to pre-lease environmental compliance and planning procedures. Others said that existing procedures between the Forest Service and the Bureau of Land Management should be retained and that the rule should adopt the regulations, Operating Orders, and policies of the Bureau of Land Management to the maximum extent possible. However, a countervailing view was expressed by a major public interest group as follows:

> We understand that others have argued that the Leasing Reform Act does not authorize the Forest Service to promulgate its own regulations governing the issuance of leases. This interpretation of the statute ignores the Forest Service's obligations for the lands it administers. By giving the Forest Service veto authority over all oil and gas leases issued for National Forest System lands, the Leasing Reform Act creates clear responsibilities on the part of the Forest Service to determine the availability of its lands for oil and gas development. These decisions by the Forest Service must be based upon the multiple-use, land-use planning directives of NFMA (National Forest Management Act) and must also be exercised in compliance with NEPA (National Environmental Policy Act).

Response: In response to this group of comments, the Department wishes to restate its objectives in promulgating this rule. These are: to satisfy judicial rulings (which occurred prior to the Leasing Reform Act) which directed the Forest Service to promulgate rules governing its role in leasing decisions and operations on National Forest System lands; to satisfy the requirements of the Leasing Reform Act; to coordinate Forest Service procedures with those of the Bureau of Land Management; and, to promote cooperation between the Forest Service, industry, and the public. The Department cannot limit the rulemaking to the requirements of the Leasing Reform Act, since, to do so, would leave a regulatory void that the courts have ordered the agency to fill. In addition, the Department believes that the industry and the public will be better served by a comprehensive rule. Consistency with the Bureau of Land Management has been sought wherever possible, but only after ensuring that the spirit and intent of statutes unique to the National Forest System are being met.

Bias against mineral development. There were perceptions that the rule was biased toward environmental protection and biased against use of National Forest System lands for mineral development; that the proposed rule did not reflect statutes which these reviewers believe mandate that land use for mineral development be given preference over other land uses unless the lands are withdrawn. Statutes cited included the Mineral Leasing Act of 1920, the Multiple-Use Sustained-Yield Act of 1960, the Mining and Minerals Policy Act of 1970, and the Organic Administration Act of 1897. Another respondent said that the rule ignored the National Forest Management Act in that it did not require cost/benefit analyses to support land use decisions; and, that it selectively implemented only those recent court decisions that were considered adverse to oil and gas development.

Response: This Department does not believe that the proposed rule was contrary to any statute. Moreover, none of the statutes cited or any other statute mandates that surface use for mineral development is to be given preference over other uses of National Forest System lands. In actuality, most statutes which govern the management of National Forest System lands, including the mineral leasing laws, specify permissible uses of those lands. This Department then makes choices from among the permissible uses in deciding how National Forest System lands will be managed. One choice may be to emphasize mineral development on a particular area of National Forest System lands.

This is consistent with the Multiple-Use Sustained-Yield Act which declares that National Forest System lands are to be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes, but also expressly provides that the Act shall not be construed to affect the use or administration of mineral resources on those lands. Similarly, the Federal Land Policy and Management Act of 1976 specifies that public lands are to be managed in a manner that recognizes the need for a domestic source of minerals. The Federal Land Policy and Management Act also declares a congressional policy that Federal lands should be managed in a manner recognizing the need to implement the Mining and Minerals Policy Act of 1970.

Except when Congress enacts laws providing special status for national forest lands, such as the Wilderness Act which provides for the designation of Wilderness areas, or laws providing for special status for a resource, such as the Endangered Species Act which makes protection of certain species paramount, most of the board statutes which govern the management of National Forest System lands suggest that all uses of National Forest System lands are to be considered on their merits and decisions should be made as to which mix of land uses would best meet the needs of the public. This Department believes that mineral development is an important and beneficial use of National Forest System lands, and that the effect of the relevant statutes is to require that such use be considered in concert with other resources and values. Experience has shown that, in most cases, land uses, including oil and gas exploration and development can be shared, or that

conflicts with other resource uses can be adequately managed to allow oil and gas operations. When this is not possible, decisions must be made as to which set of resource values and land uses would provide the public the greatest benefit.

With respect to suggestions that the proposed rule selectively implements court decisions, the Department is required to comply with all applicable court rulings and is unaware of having avoided compliance with the principles of any court ruling, including those that bear on the process by which the Forest Service reviews and approves actions related to the oil and gas program.

Conflicts with existing leasing and planning process. Some reviewers felt that the proposed rule contradicted existing leasing and forest planning processes and that this violated the intent of the Leasing Reform Act. There were accusations that the Forest Service was intentionally complicating leasing procedures in order to delay or prevent oil and gas leasing and development on the National Forest System. Concern was also expressed that the Forest Service would not have the funding or personnel to implement the rule and still provide timely service to oil and gas companies.

Response: Contrary to these comments, the proposed rule was not inconsistent with established planning processes. In fact, as stated in the preamble, the intent was to incorporate leasing decisions into the established processes to the extent practicable. In addition, the proposed rule would not have required new funding or additional personnel. The standards and procedures proposed were by and large continuations of existing procedures, particularly with respect to renewing and approving surface use plans of operation. The Forest Service felt that the determination of lands suitable for leasing and the handling of noncompliance proceedings could be absorbed by existing personnel.

Affect on the program and costs to participate. Some reviewers expressed fear that the rule would virtually eliminate oil and gas leasing within the National Forest System because the proposed standard stipulation would remove any guarantee that operations would be approved, thus, making the risk to industry too high. Some respondents also thought that the costs associated with bonding would deter oil and gas leasing on the National Forest System. There were demands for the rule to be reproposed and threats of court action if the bonding provisions were made final as proposed.

Some respondents said that the rule would substantially increase costs for the Government, industry, consumers, and economic regions; that it would adversely affect employment, investment, productivity, competition, innovation, local economies, and the strength of the nation; that the rule would have a "major" effect on the economy (i.e., one that would exceed $100 million); and, that it would effectively preclude all but the largest of companies from participating in the program because of the risk associated with approval of operations and the additional costs of bonding. One reviewer estimated that the additional reporting and inspection requirements in the rule would cost lessees $2,500 per year per well, or a six to ten percent increase over the cost of drilling the shallow wells typical of the area with which the reviewer was familiar.

Response: The Department agrees that because of the uncertainty created by use of the standard stipulation, bonus bids for lease sales on National Forest System lands could be adversely affected if the rule were implemented as proposed. Also, the cost of obtaining bonds that satisfied the proposed rule could have been so prohibitive as to have precluded all but the largest companies from participating in the program.

The final rule has been revised to exclude the standard stipulation that retained the right of the Forest Service to deny all operations. (However, this does not mean that all operations must be approved. See response to comments under Section 103). Also, bonding provisions have been revised in the final rule to be consistent with those used by the Bureau of Land Management. With these changes, it is very unlikely that the rule could have a major economic effect.

Balancing development with environmental protection. Even though they did not support the proposed rule in its entirety, some reviewers were pleased that the rule was comprehensive and believed that it was a good start at addressing certain land use planning and environmental analyses issues that had surfaced in recent court decisions and in the Leasing Reform Act. Within this group of comments was a suggestion that the preamble of the final rule indicate the Forest Service seeks to not only facilitate the orderly and environmentally sound development of oil and gas resources but also to protect sensitive environmental resources from the adverse impacts of oil and gas development. One respondent expressed the view that because oil and gas development is a land use that interferes with nonconsumptive and renewable resource uses, it is important that the public be allowed to monitor and regulate such development. It was also recommended that, for compliance with recent court cases, the Forest Service should commit to preparation of environmental impact statements prior to leasing even though under the proposed rule, a standard stipulation reserving the right to deny operations would be used.

Response: The Department agrees that its mission includes protection of other National Forest resources from the impacts of oil and gas development when such action is determined to be more in keeping with the public interest than allowing development. The mission statement in the preamble to the proposed rule reflected this policy. However, we do not agree that the impacts of oil and gas development are such that environmental impact statements must necessarily be prepared prior to all leasing. Consistent with Council on Environmental Quality regulations governing National Environmental Policy Act compliance (40 CFR Parts 1500–1508), the need for an environmental impact statement should emerge from scoping and environmental analysis conducted on proposed leasing.

The final rule provides a number of opportunities for public input prior to decisions being made. These opportunities provide the public with a means to "monitor" oil and gas development. In addition, ongoing oversight by Congress as well as industry and public interest groups already provides substantial monitoring of mineral activities on National Forest System lands. See comments on section 103 for a response to the use of the standard stipulation.

Policy suggestions received. One reviewer suggested the Forest Service establish a policy of sequential leasing whereby some areas of a Forest would be open to development while other areas would be renewing and restoring those surface resource values that had been impacted by oil and gas development. Another recommended that there be bi-annual review of each Forest's leases and leasing policies to ensure conformance with National policies.

Response: A rest-rotation cycle for oil and gas leasing would be impractical, since the location of oil and gas resources is not known prior to exploratory drilling. As a consequence, a large amount of land has to be leased to allow discoveries to be made. With

respect to the suggestion that there be bi-annual reviews, the Forest Service already has in place an annual attainment, reporting, and management review process, by which Forest Service programs, including leasing, are evaluated on a unit, Regional, and National basis. An additional bi-annual leasing review is not needed.

National Environmental Policy Act. It was noted that decision points requiring National environmental Policy Act (NEPA) compliance appeared in the rule, but that the rule was not clear as to whether "compliance" meant an environmental assessment, an environmental impact statement, or a categorical exclusion review. It was noted there were no provisions requiring consulting with or seeking recommendations from other agencies, or for complying with the Endangered Species Act. Clarification of roles, responsibilities, and coordination procedures with the Bureau of Land Management was also requested.

Response: With respect to NEPA compliance, agencies are allowed to, and usually do, prepare an environmental assessment to determine whether an environmental impact statement is necessary. The need for an environmental impact statement is determined on a case-by-case basis under existing agency procedures in Forest Service Manual chapter 1950 and Forest Service Handbook 1909.15 published in the **Federal Register** on June 24, 1985 (50 FR 26078). A decision to categorically exclude a proposed action from documentation in an environmental assessment or an environmental impact statement applies only to those actions that do not result in surface disturbance of any consequence. A categorical exclusion is thus highly unlikely for decisions involving leasing or drilling. The proposed rule did not include provisions specifically requiring consultation with other agencies since it was felt that such consultation is already required in existing regulations applicable to National Forest System lands; for example, in the planning regulations 36 CFR part 219, and the NEPA implementing regulation at 40 CFR parts 1500–1508.

With respect to coordination with the Bureau of Land Management, the Forest Service has previously entered into a number of formal agreements with other agencies, including the Bureau of Land Management, that set out coordination procedures between the agencies. The Department prefers this approach to committing to coordination through rules if possible, as it allows greater flexibility for the agencies to make revisions to adjust procedures to local situations. The current controlling agreement with the Bureau of Land Management is set forth in Forest Service Manual (FSM) Chapter 1531.12d—Interagency Agreement for Mineral Leasing, and is reflected in formal mining and mineral policy (FSM 2800). The two agencies will revise the agreement subsequent to the final rule being issued.

Specific Comments

The following summarizes the major specific comments and suggestions received on the proposed rule and the Department's response.

Section 228.100 Scope and Applicability

This section established the scope and applicability of the proposed rule and informed the reader of other relevant, related rules that govern oil and gas leasing on National Forest System lands.

Comment: Several respondents expressed oppostion to the rule being made applicable to leases and operations already in effect. They said such action would be an unconstitutional taking of private property without due process.

Response: The Leasing Reform Act provisions apply to prospective leases and, in some cases, to existing leases. This Department does not believe that any aspect of the final rule involves a taking of private property. While the procedures by which rights under existing leases can be exercised are being revised by this rulemaking, the rights granted remain unchanged.

Comment: Another person said that the intent of Congress in passing the Leasing Reform Act was for the Forest Service only to administer the surface operational aspects on National Forest System lands, not to duplicate the role of the Bureau of Land Management and that the rule should incorporate by reference the rules, Onshore Order, and Notices to Lessees issued by the Bureau of Land Management.

Response: Contrary to this reviewer's assertion, the Leasing Reform Act does not limit the Forest Service role to administration of operations. In fact, the Act expanded the Secretary of Agriculture's authority to object or to not object to leases on National Forest System lands. Also, 30 U.S.C. 226(g)-(h) authorizes the Secretary of Agriculture to regulate all surface-disturbing activities. No surface-disturbing activities can take place on a lease without further environmental analysis and approval of the plan of operations by the Secretary. However, the proposed rule made it clear that the Forest Service does not intend to duplicate the Bureau of Land Management's role. The Department acknowledges that the rules, Orders, and Notices issued by the Bureau of Land Management apply to oil and gas leases within the National Forest System to the extent that such instruments do not conflict with these rules which implement the authority granted the Secretary of Agriculture under the Leasing Reform Act or other statutes controlling the administration of the National Forest System. However, there are legal impediments to the incorporation or adoption of another agency's rules, primarily due to the fact that the adopting agency would have no control over changes being made by the lead agency. Nevertheless, the final rule at §228.105 does contain a provision for the issuing or co-signing of Orders with the Bureau of Land Management.

Comment: Other respondents requested clarification as to whether seismic operations conducted by a lessee on a lease would be considered operations under the rule, requiring approval of a surface use plan of operations, or whether they would be considered "outside leasehold" activities. One reviewer said many problems could be solved if the rule covered geophysical exploration.

Response: With respect to geophysical exploration conducted on a leasehold by or on behalf of a lessee, we believe that the intent of Congress in passing the Leasing Reform Act was for the Secretary to have jurisdiction over all oil and gas activities involving surface use in the National Forest System. Procedures for authorizing both on- and off-lease geophysical exploration are already established in Forest Service Manual chapter 2860 and 36 CFR part 251, and these procedures have worked well.

Comment: Another group of respondents felt that all facilities directly associated with exploration, development, and production should be considered a lease right whether located on or off the leasehold, that approval of both a surface use plan and a special use permit would create two opportunities for appeals, and would lead to the preparation of two NEPA documents for what really was a single project. One reviewer felt that if a tank battery or drill site was being located off a leasehold, it was because the Forest Service required it through lease stipulations or to protect surface resources and that the Forest Service should not require separate applications and permits.

Response: The mineral leasing laws govern operations conducted on an oil

and gas lease. However, nothing in those statutes confers any authority upon this Department to exempt lessees from the statutes and regulations governing the conduct of activities on National Forest System lands outside a leasehold. Therefore, this Department cannot agree with the suggestion to treat a lease as conveying a right to locate facilities directly associated with oil and gas operations outside the boundaries of the leasehold. Admittedly, this does create a situation in which there would be two opportunities for administrative appeals of Forest Service decisions if a lessee does not submit a request for associated off-lease activities at the same time the lessee requests approval of operations on the leasehold. For this reason, operators are encouraged to apply for necessary off-lease use authorizations at the time they submit their proposals to conduct operations on leaseholds. This permits the preparation of a single environmental document and concurrent approval of the off-lease activities and on-lease operations and obviates the possibility that there would be two appeal opportunities for possibly related actions. Therefore, the final rule has not been revised in this regard.

Section 228.101 Definitions

This section provided definitions for the terms used in the proposed regulation.

Comments: In general, most reviewers wanted the Forest Service to acknowledge the definitions used by the Bureau of Land Management. One individual suggested that the scope of the definition of "operator" include the entire proposed action whether on or off the leasehold. Another respondent said that if the "surface use plan of operations" definition was changed, the phrase "on a leasehold" should be deleted. One of the respondents stated that the definition of "surface use plan of operations," should read: "A plan that meets the requirements of Onshore Oil and Gas Order No. 1, the requirements of the Notice of Lessees (NTL–2B, or Sundry Notices and Reports on wells for new surface disturbance)."

Response: The Department agrees that terms should be consistent between the agencies as much as possible; therefore, several terms and their respective definitions have been added to the final rule for consistency with Bureau of Land Management regulations. These terms include: Lessee, Notice To Lessees and Operators, and Onshore Oil and Gas Order. Definitions for operator and surface use plan of operations have been revised to parallel the terms as defined in Bureau of Land Management regulations at 43 CFR 3100.0–5.

Comments: Two respondents recommended that the proposed definitions for "assignee" and "assignment" be amended to be consistent with Bureau of Land Management definitions. One reviewer indicated that although the Mineral Leasing Act makes a distinction between an "assignee" and a "sublessee," the Forest Service's proposed definition could encompass both. To avoid any confusion, this reviewer recommended that the Forest Service use the same terminology as is used by the Bureau of Land Management in its regulations: i.e., a "transferee" shall include "assignees" and "sublessees." Similarly, it was recommended that the reference to an assignment should be changed to a "transfer," which encompasses both assignments of record title and assignments of operating rights. In order to avoid the inference that the original lessee might be responsible for performance of obligations even after all the lessee's interest has been assigned, they recommended that the Forest Service adopt the same definition as is used by the Bureau of Land Management in 43 CFR 3100.0–5(A).

Response: After considering the individual comments addressing the term "assignment" and "assignee," the final rule adopts the terms "transfer" and "transferee" as defined in Bureau of Land Management, U.S. Department of the Interior, regulations at 43 CFR 3100.0–5(e). To accommodate the adoption of the Bureau of Land Management's definition of the terms "transfer" and "transferee," the final rule also adopts the Bureau of Land Management's definitions of the terms "operating right" and "operating rights owner."

As to the concerns related to the lessee's liability after assignment of all lease interest, the original lessee does remain liable for any noncompliances that occurred during the period of liability (i.e., the time during which the original lessee's bond was in force) regardless of whether the noncompliance was identified before or after the bond was released.

Comments: Ten respondents expressed their concerns relative to the definition of the terms "Leasehold" and "Off-Leasehold". One reviewer said that the proposed rules should contain a separate definition for both "leasehold" and "off-leasehold," that neither definition makes reference to unitization and communitization agreements. All ten respondents felt that unitization and communitization agreements are essential components of oil and gas activity and should not be omitted from the proposed regulations.

Response: This Department agrees. The definition of leasehold has been amended to include unitized and communitized areas. The definition of off-lease has been deleted since it is obvious that, if an activity is on a leasehold, it is not off a leasehold.

Comments: Five respondents commented on the definition of the term "Operations." Three expressed concern that the use of the term "utilization" within the definition of "operations" is unclear and indicates consumption by the lessee and that use of the term "utilization" also implies that the Forest Service is assuming the authority for approval of an operator's on-lease utilization of production which is within the authority of the Bureau of Land Management. Another respondent noted that the term "utilization" of oil and gas resources is not commonly used in the petroleum industry and that it implied consumption, which is inconsistent with the intent of the definition. This reviewer recommended that the term be deleted from the definition. Three reviewers recommended that the definition which would cover all operations, should be amended as follows: "Surface disturbing * * * including but not limited to, exploration, development, and production of oil and gas resources and reclamation of surface resources."

Response: In response to these concerns, the definition of "operations" has been revised as suggested in the final rule and the term "utilization" has been omitted.

Comments: It was also suggested that the final rule provide a definition for the term "Material Noncompliance."

Response: Material Noncompliance has not been defined in the final rulemaking. Because of diverse land surfaces, animal life, and the uniqueness of many surface disturbances, the determination of whether noncompliance is material must be determined on a case-by-case basis. However, § 228.113 of the final rule has been expanded to provide examples of material noncompliance to assist the authorized Forest officer in deciding whether the operator may be in material noncompliance.

Comments: Some individuals requested that the terms "Stipulations," "Successful Reclamation," and "substantial modification" (used in § 228.104) be defined in the final rule.

Response: The term "stipulations" refers to text or clauses attached to leases which modify or supplement a term or condition of the standard lease

form such that the rights ordinarily granted are affected. The Department does not believe it necessary to define this common term. The term "successful reclamation" has been removed in the final rulemaking since it is so dependent on land conditions, topography, and other factors as to defy generic definition. The term "substantial modification" has been defined.

Section 228.102 Determination of Lands Suitable for Leasing

This section of the rule would have established procedures for determining the suitability of National Forest System lands for leasing. The procedures required identifying lands with potential for leasing, scheduling of lands with leasing potential for suitability review, and conducting reviews under the guidelines provided in the proposed rule. The proposed rule specifically required compliance with the National Environmental Policy Act.

Comments: Most of those commenting on this section said it should be removed, that leasing decisions should be based on Forest land and resource management plans, and that there was no need for separate suitability reviews. There was a sense that this section would create a time consuming, cumbersome process that would substantially delay or even prevent leasing. Some said that the Forest Service lacked authority for such a proposal. Others said the rule violated the Administrative Procedure Act by referring to Manual Chapter 1950 and Forest Service Handbook 1909.15 which had not been subjected to public review.

There were a number of recommendations to simply adopt the approach used by the Bureau of Land Management to satisfy NEPA prior to lease issuance. Others supported this section but said it should be improved to make it more workable and understandable. In particular, this group wanted the rule to be more specific with respect to NEPA compliance and environmental protection and to provide greater opportunity for public participation. Comments made to specific subsections were as follows.

(a) *Compliance with NEPA.* Some respondents wanted the rule to be more specific as to how NEPA compliance would be achieved and what would be included in the NEPA document. There was concern that the standard stipulation proposed in § 228.103 might be used as a substitute for preparing comprehensive pre-lease documents that analyzed the impacts of lease activities and included cumulative impact analyses. One reviewer said that NEPA compliance and the stipulation appeared to be mutually exclusive.

Clarification was requested as to how the Forest Service would factor into pre-lease NEPA analyses its new authority under the Leasing Reform Act to deny operations. There was also a request for a timeframe to be provided for completion of NEPA review. There was an opinion given that NEPA compliance should be addressed at the time operations are proposed rather than prior to leasing. Finally, some said a requirement to comply with NEPA did not belong in the regulations, since it was already a binding obligation under the law.

(b) *Identification of potential leasing areas.* Many respondents on this section expressed concern that unless areas were considered to have potential for leasing they would not be analyzed and could not be leased. Therefore, exploration would not occur in areas of unknown potential for oil and gas resources. They felt that no prioritization was necessary, or that if areas of potential interest were to be identified it should be done by industry or the Bureau of Land Management. Some reviewers wanted to know what standards the Forest Service would use to determine that an "area is known to be favorable for accumulation of oil and gas resources." Others said that identification of potential leasing areas should be done during forest planning. One party questioned the ability of the Forest Service to comply with a suitability review schedule considering funding and personnel constraints.

(c) *Review of lands for leasing suitability.* Comments to this section indicated confusion over how this review for suitability meshed with forest land and resource management plans. There was concern that the suitability review was creating another layer of environmental review and that it would close large areas to oil and gas leasing. Numerous technical changes were recommended to better organize the section and to integrate it with the NEPA process. There were comments to the effect that lands with special resources or values should be added to the list of areas excluded from further review, in particular, lands recognized as critical fish or wildlife habitat, as well as those lands dedicated to other activities under the multiple use concept of the forest land and resource management plans.

(d) *Determination of suitability.* The comments on this section were mostly negative. Some said it was unnecessary, that the Forest Service had no authority for making determinations of suitability, that it was a new planning or regulatory test that would only serve to obstruct oil and gas leasing and that forest plans should be used to determine which lands should be available for leasing. Some objected to leasing having to be consistent with, or not precluded by a plan. They were concerned that many forest plans are deficient and that such a finding may not be possible. One respondent suggested that lands be leased unless leasing was specifically precluded by a plan.

Others supported this section. One of those supporting the section said that lease stipulations should also be identified and based on information contained in NEPA documents, not just based on information in plans or compliance with laws, as was implied by the rule. Another reviewer said that it should be made clear that the suitability decision is an appealable decision under 36 CFR part 217.

Response: After considering these comments, this section of the rule has been revised. Under the final rule, discrete suitability determinations will no longer be made. The rule now focuses on the process and decision criteria to be used by the Forest Service in deciding whether to authorize the Bureau of Land Management to offer oil and gas leases for National Forest System lands subject to the operation of the mineral leasing laws.

There are two basic stages in the process set forth in the rule for deciding whether to authorize the Bureau of Land Management to offer oil and gas leases for National Forest System lands. The first stage is referred to as a "leasing analysis." The focus of that analysis is to identify those National Forest System lands subject to the operation of the mineral leasing laws which the Forest Service will agree to make administratively available for leasing. The analysis performed during this stage is premised upon the recognition that oil and gas operations are a permissible use of National Forest System lands subject to the operation of the mineral leasing laws but that the Forest Service may choose to manage particular tracts of such lands for uses other than oil and gas operations. A determination that lands are administratively available for oil and gas leasing does not commit the Forest Service to authorizing the Bureau of Land Management to offer leases for such lands. The decision as to whether to authorize the Bureau of Land Management to offer National Forest System lands for leasing is made at the conclusion of the second stage of the process set forth in the rule. The second

stage is referred to as the "leasing decision for specified lands."

The rule provides direction for the Forest Service as to the identification of National Forest System lands that are to be included in an individual leasing analysis. Each individual leasing analysis will be confined to lands within one National Forest or a portion thereof. If leasing analysis is not done forest-wide, more than one "area-wide" leasing analysis may be ongoing on a National Forest at one time.

The rule also provides direction as to lands that are to be excluded from leasing analysis. Since most National Forests contain lands that cannot be leased because they are not subject to the operation of the mineral laws, the rule provides that such legally unavailable lands will be excluded from leasing analysis. The rule also provides for the exclusion of an additional category of lands from leasing analysis. The lands in that category are those for which the Forest Service has already conducted an analysis considering the appropriateness of oil and gas leasing. One component of the previous analysis necessarily was the appropriateness of managing those lands for oil and gas operations. Therefore, a determination as to whether the lands will be made administratively available for leasing or whether the lands will be managed for other of the permissible uses of the National Forest System lands has already been made. The Department believes that repeating this analysis is unnecessary and would involve an unwarranted use of federal funds.

After the lands to be studied in each particular leasing analysis have been defined, the rule requires the Forest Service to develop a schedule for the leasing analysis or analyses on each National Forest. This schedule will be developed in cooperation with the Bureau of Land Management after consultation with the industry and interested members of the public. The Forest Service will review the schedule at least annually, and make any appropriate revisions in the schedule. The purpose of scheduling areas for leasing analysis is only for work planning and budget preparation. Other areas can be identified at any time and added to the schedule.

A number of the comments on the proposed rule questioned the interface between Forest Service oil and gas leasing decisions and Forest Service land management planning decisions. Many of those comments urged that oil and gas leasing decisions be made in the record of decision adopting a forest land and resource management plan. The final rule provides that the determination as to those lands that Forest Service will make administratively available for leasing may be included in the record of decision for a forest plan and its accompanying environmental impact statement. However, it may not be practicable or desirable to make the leasing analysis (administrative availability) decision as part of the decision adopting a forest plan. In addition, most forest plans have already been completed and many of those plans do not include the leasing analysis required by the final rule. Therefore, the final rule also provides that the determination as to those lands that the Forest Service will make administratively available for leasing may be a separate proposed action that is analyzed and documented in environmental document(s) that do not accompany a forest land and resource management plan. This option regarding including the leasing analysis decision in the decision to adopt a forest plan applies to either a forest-wide or an area-wide leasing analysis.

The rule also sets forth items that always must be considered and documented as part of a leasing analysis. One requirement is that the documentation include maps which show lands that the Forest Service will make administratively available for leasing subject to the terms and conditions of the standard oil and gas lease form, lands that the Forest Service will make administratively available subject to lease stipulations that will prohibit the use of contiguous areas on the leasehold larger than 40 acres, lands that are legally unavailable for leasing, and lands that the Forest Service will make administratively unavailable for leasing. Another requirement is that the environmental document(s) will identify alternatives to the Forest Service's proposal as to the lands to be made administratively available, including the alternative of making all of the lands administratively unavailable. The rule also requires that the environmental document(s) prepared in support of the leasing analysis will make a projection as to the type and number of operations that are reasonably foreseeable on the lands that would be made administratively available under the Forest Service proposal and each alternative to the proposal. Finally, the rule requires that the Forest Service analyze the reasonably foreseeable environmental impacts of the projected operations on the lands that would be made administratively available under the Forest Service proposal and each alternative to the proposal. Each of the items which the rule requires the Forest Service to consider and document in a leasing analysis is similar to the items considered and documented by the Bureau of Land Management in the preparation of land management plans for lands that the Bureau administers.

The environmental document(s) supporting the leasing analysis would also identify any lease stipulations necessary to mitigate possible adverse impacts of the operations on National Forest System surface resources. In addition, the environmental document(s) will discuss the use of Forest Service authorities, including those under the Leasing Reform Act, to approve a particular proposed plan of operations, or to disapprove a particular proposed plan of operations if, for example, the authorized Forest officer finds the proposed operations would lead to unacceptable impacts on surface resources. In deciding what lands to make administratively available for leasing, the Forest Service will consider whether the reasonably foreseeable environmental consequences of projected oil and gas operations on those lands would be acceptable.

At the conclusion of the leasing analysis, the Forest Service will decide whether to make some or all of the lands studied in the leasing analysis administratively available for oil and gas leasing. The rule provides that the leasing analysis decision will identify those lands that the Forest Service has concluded it will make administratively available for leasing. The rule also requires the Forest Service to promptly transmit a copy of the leasing analysis decision to the Bureau of Land Management. The leasing analysis decision will be appealable to the Forest Service in accordance with 36 CFR part 217.

From time to time after the Forest Service has notified the Bureau of Land Management of National Forest System lands that are administratively available for leasing, specific tracts of land that the Bureau of Land Management proposes to lease will be identified. When those tracts are identified, the Forest Service will decide whether to authorize the Bureau of Land Management to offer the lease(s). The rule provides that the decision to authorize the Bureau of Land Management to offer the lease(s) is dependent upon the results of three determinations that the Forest Service must make.

The first determination calls for two independent findings. One finding involves compliance with the National Environmental Policy Act (NEPA). The other finding involves compliance with

the National Forest Management Act (NFMA).

The NEPA related finding is that oil and gas leasing of the specified lands has been adequately addressed in an environmental document. If existing environmental document(s) satisfy NEPA and adequately disclose the environmental consequences of issuing lease(s) for the specific lands, additional environmental documents need not be prepared. If existing environmental document(s) are not adequate to satisfy NEPA, additional environmental document(s) will be prepared. Until the Forest Service completes such additional environmental document(s) and finds such document(s) adequate to satisfy NEPA, the Forest Service could not authorize the Bureau of Land Management to offer lease(s) for specific lands.

The NFMA related finding is that oil and gas leasing of the specified lands would be consistent with the applicable approved forest land and resource management plan. Consistency with the applicable forest plan is required by the National Forest Management Act. The finding as to the consistency of leasing the specified lands with the applicable forest plan is made by comparing the proposed leasing with both the Forest-wide management standards and guidelines and the management area direction for the lands in question that are established by the approved forest land and resource management plan. If the issuance of leases for the specified lands is not consistent with both the general and the specific management direction in the approved forest plan in effect at that time, the Forest Service may not authorize the Bureau of Land Management to offer the lands for leasing unless the forest plan is amended. If the Forest Service should find that leasing of the specified lands would be inconsistent with the existing approved forest plan but that this leasing nevertheless would be in the public interest, the Forest Service retains the discretion to appropriately amend the forest plan to change the management direction.

Assuming that leasing is inconsistent with the forest plan, the Forest Service could not authorize the Bureau of Land Management to offer lease(s) for the specified lands until an appropriate plan amendment has been approved.

A plan does not have to specifically consider oil and gas leasing in order for a consistency determination to be made. For example, unless the management prescription for an area will preclude operations necessary to exercise the rights conveyed by an oil and gas lease, issuing an oil and gas lease in that area will be consistent with the forest plan if the lease is made subject to the stipulations necessary to implement the management direction for that area.

A finding that leasing specified lands is consistent with the approved forest plan is more narrow than the decision as to whether or not the Forest Service will authorize the Bureau of Land Management to offer the specified lands for leasing. The forest plan sets the management requirements which must govern the conduct of operations on any lease that may be issued should leasing of the specified lands be authorized by the Forest Service. However, it is possible that compliance with statutes such as the National Environmental Policy Act or the Endangered Species Act for the decision on leasing specified lands will indicate that environmental protection measures in addition to those required by the management direction established by the forest plan are warranted or that leasing of the lands is not appropriate despite the fact that such leasing would be consistent with the forest plan. If compliance with statutes such as the National Environmental Policy Act or the Endangered Species Act for the decision on leasing specified lands results in a conclusion that additional environmental protection measures are warranted in addition to those required by the management direction in the forest plan, a decision authorizing the Bureau of Land Management to offer the lands for leasing would require the Bureau to include stipulations in the lease that specify the additional environmental protection measures as well as the applicable management direction specified by the approved forest plan.

The second determination is that all applicable surface occupancy conditions identified during the leasing analysis would be implemented through the inclusion of appropriate stipulations in any lease(s) that may be issued. Appropriate stipulations would be those necessary to implement the management direction in the forest plan as well as those identified in the environmental document(s) as mitigation measures for possible adverse impacts of oil and gas operations on National Forest System surface resources.

The third determination that the rule requires the Forest Service to make is that oil and gas operations for the benefit of the lease could be allowed somewhere on the lease unless stipulations prohibiting all surface occupancy are to be used. Much of the criticism of the proposed rule by the oil and gas industry was that lessees were being called upon to invest substantial sums for leases on which operations might never be authorized. This Department has determined that leases that are issued for National Forest System lands should vest the lessee with the right to conduct oil and gas operations somewhere on the lease. Accordingly, when a decision is made on authorizing the Bureau of Land Management to offer National Forest System lands for leasing, it is necessary to ensure that each lease would have development potential. (However, while at the time a lease is issued it might appear that operations could be approved on the lease, by the time such operations are proposed, they might be precluded by the operation of a nondiscretionary statute such as the Endangered Species Act.)

Once a conclusion is made with respect to each of the three required determinations, the Forest Service will make a decision as to whether to authorize the Bureau of Land Management to offer lease(s) for the specified National Forest System lands. The only lease(s) that the Bureau of Land Management shall be authorized to offer are those for which the Forest Service has determined that (1) leasing is consistent with the applicable forest plan and is adequately addressed in an appropriate NEPA document, (2) the conditions of surface occupancy identified during the forest-wide or area-wide leasing analysis will be implemented by the inclusion of appropriate stipulations in any lease(s) that may be issued, and (3) oil and gas operations could be allowed somewhere on each proposed lease, except where stipulations will prohibit all surface occupancy. The rule provides that the leasing decision for specified lands will identify those leases that the Forest Service has concluded it will authorize the Bureau of Land Management to offer. The rule also requires the Forest Service to promptly transmit a copy of the leasing decision for specified lands to the Bureau of Land Management. The leasing decision for specified lands will be appealable to the Forest Service in accordance with 36 CFR part 217 if additional environmental documents were prepared in connection with making the decision.

Overall, the process adopted in the rule is similar to that now used by the Bureau of Land Management.

Some who commented on the proposed rule questioned how the Forest Service would factor its new authority to approve oil and gas operations into its decision on authorizing the Bureau of Land Management to offer National Forest System lands for leasing. This

Department has determined that the statutory authority of the Leasing Reform Act to approve operations essentially has no affect on the lease issuance decision (the leasing decision for specified lands) or the decision as to lands that are administratively available for leasing (the leasing analysis decision). This is because the Government has always had the authority to disapprove a particular proposal to conduct operations made by a lessee if the proposed operations would have unacceptable impacts on the surface resources of National Forest System lands.

With respect to the suggestion that the rule specify what environmental documents would be prepared by the Forest Service in deciding whether to authorize the Bureau of Land Management to offer leases for National Forest System lands, this Department does not believe that this would be appropriate. Consistent with Council on Environmental Quality regulations governing National Environmental Policy Act (NEPA) compliance (40 CFR parts 1500–1508), the determination as to what environmental documents must be prepared should emerge from scoping and environmental analysis conducted on proposed leasing. However, as suggested by other comments on the proposed rule, the final rule does provide more direction as to what information should be included in whatever environmental document is prepared for the Forest Service leasing analysis decision. This direction should help ensure that the Forest Service conducts appropriate environmental analysis and prepares comprehensive environmental documents in deciding whether to authorize leasing of National Forest System lands. This Department believes that comprehensive compliance with environmental statutes will serve both to bring stability to this very important program by allowing leases to be issued with greater certainty with respect to the rights being granted and to provide certainty that appropriate environmental safeguards are enforced.

The Department cannot agree with the suggestion that compliance with NEPA should occur only when operations are proposed. The law is clear that the Forest Service must comply with NEPA in deciding both whether to authorize leasing of National Forest System lands and whether to permit operations on those leases.

The Department also believes that it would be inappropriate to specify a time period in the rule during which compliance with NEPA must be completed. Varying circumstances make it impossible to predict how long it will take to complete environmental documents for the lease authorization decision. If the rule included a time period, there would be circumstances in which the NEPA process could not be completed within the time provided.

The final rule does require compliance with the Forest Service Manual and Handbook listed in the proposed rule. The specified Manual and Handbook are the primary sources of internal NEPA direction to Forest Service personnel. Including this requirement in the final rule is not a violation of the Administrative Procedure Act. The particular Manual and Handbook have been subject to public notice and comment. Pursuant to 5 U.S.C. 552 and 36 CFR part 200.4–.5, these materials are readily available to the public.

Section 228.103 Notice and Transmittal of Suitability Decision

The proposed rule indicated that public notice would be given of suitability decisions, and that the Bureau of Land Management would be promptly notified in writing once suitability decisions were made. The proposal also specified that a standard stipulation would be included in oil and gas leases issued for the National Forest System.

Comments: Those disagreeing with the concept of making suitability determinations (section 102) also disagreed that there should be any notice or transmittal of suitability decisions. Others wanted the section expanded to include additional standard stipulations and to provide specific guidance on what situations would lead to their use. It was believed this was necessary to ensure that surface resources would not be adversely affected by oil and gas operations. One respondent recommended that the section require a policy consistency review following the suitability decision but prior to giving notice to the Bureau of Land Management. Another party felt that the rule should require outside individuals or groups to pay a $1000 filing fee at the time they submit appeals of suitability decisions, with the fee being refundable if the appeal were successful. The remaining comments on this section were more specific as follows:

(a) *Public notice.* Approximately half of those commenting on this provision recommended that it be deleted. They also stated that there was no need for an additional notice since the public was already receiving notices through the Forest planning process and through the mandatory 45-day posting by the Bureau of Land Management prior to offering lands for lease. Others thought that this notice requirement should be retained but that, in addition to appearing in local newspapers, it should have wider circulation, e.g. direct mailing to individuals/organizations expressing interest, posting at Regional Forester, Forest Supervisor, and District Ranger Offices, publication in a major daily newspaper, and notice in the **Federal Register.** Other reviewers noted that the citation for the appeal regulations was incorrect.

(b) *Notice to the Bureau of Land Management.* The majority of comments on this provision recommended its deletion since it was felt the planning process provided adequate notice to the Bureau of Land Management. One party requested clarification as to whether this notification was to occur before or after resolution of appeals and/or litigation.

(c) *Standard stipulation.* Most of those commenting on this section of the rule believe that the proposed standard stipulation would seriously affect exploration and development of oil and gas on National Forests by creating uncertainty as to whether leases would be conveying any rights to drill wells. They believed the stipulation would devalue leases to the point that industry would not bid for leases involving National Forest System lands at future competitive lease sales. Many reviewers disagreed with the claim in the preamble to the proposed rule which claimed the stipulation was necessary to comply with recent court decisions. They felt that the rule misinterpreted the Leasing Reform Act, that Congress intended only to codify existing administrative practice with respect to post-lease operations, not create a system that could deprive lessees of the right to drill and produce without receiving compensation. Some of those commenting supported their objection to the stipulation by comparing the intent of Congress in the Leasing Reform Act to its intent in the Outer Continental Shelf Lands Act in which Congress did provide for compensation in the event operations were denied. A few suggested alternative wording that would ensure lessees would receive compensation if lease rights could not be exercised.

Some parties objected to the retroactive effect of the stipulation, claiming this was an unconstitutional taking of property. Others held strong views concerning the negative effect the stipulation would likely have on revenues (both Federal and State). One reviewer claimed the stipulation was contrary to the primary intent of

Congress in passing the Leasing Reform Act, that is, to obtain fair value for the public when leasing its resources.

Another group of respondents objected to the stipulation, not for its perceived effect on lessees, but because they felt it would create uncertainty regarding post-lease environmental protection. They preferred that specific stipulations addressing specific concerns on specific lands be used. This group (as well as others who supported use of the stipulation) was concerned that the stipulation might be used as a substitute for integrated, comprehensive planning for oil and gas development and that decisions on land use and development would not be made prior to leasing. They felt that deferring such decisions would frustrate any meaningful public involvement prior to leasing. One party recommended that the stipulation only be used in sensitive areas that would otherwise not be leased, but where industry has continued interest, and where it is willing to accept leases with the risk of not being able to explore, develop, or produce.

A few of those commenting supported use of the stipulation. One reviewer wrote that the stipulation,

> will ensure that in the event unforeseen circumstances warrant, the Secretary can prevent oil and gas activities from impairing non-oil and gas resources or the public's health and safety. This stipulation is necessary, for example, in instances where, despite the preparation of an EIS prior to leasing, the existence of an eagle nesting site, or rare plant species are discovered only after a lease has been issued and a permit to begin drilling is sought. Moreover, many circumstances can change over the term of an oil and gas lease. Critical habitat needs can shift. Changed patterns of land use beyond the Forest boundary can affect resources, especially wildlife, within the Forest.

Among those supporting use of the stipulation it was felt that the stipulation should be applicable to all lease activities, not just those requiring approval of a surface use plan; that the final rule should clarify that the authority to deny operations would be exercised whenever necessary, not just in "exceptional circumstances" as stated in the preamble to the proposed rule; and, that the rule should contain provisions for compensating lessees in the event that drilling could not be approved.

Response: As stated previously in the response to comments on § 228.102, the requirement for making suitability determinations has not been retained in the final rule. Instead, the rule now specifies that decisions to authorize leasing of National Forest System lands will be made in a two stage process, the first being the identification of lands that are administratively available for leasing and the second being whether to authorize the Bureau of Land Management to offer leases for lands identified as administratively available.

Many of the respondents assumed that the decision to authorize leasing of National Forest System lands would be made in the applicable forest land and resource management plan. However, as explained in more detail in the response to comments on § 228.102, while the decision as to lands that are administratively available for leasing may be made as part of the decision adopting a forest plan, the decision to authorize issuance of leases already will not be made as part of the decision adopting a forest plan. This is because specific consideration of the leases to be offered will be required to decide whether it will be possible to conduct operations for the benefit of the lease somewhere on each proposed lease.

Since the NEPA compliance process for the decisions as to the administrative availability of lands and as to authorizing the issuance of leases already requires public participation, the Department agrees with respondents who observed that the public notice requirement in the proposed rule was repetitive and unnecessary. Therefore, the final rule does not require that the public be given separate notification of either the leasing analysis decision or the leasing decision for specified lands.

The requirement to notify the Bureau of Land Management of a Forest Service decision authorizing the issuance of leases for National Forest System lands has been retained in the final rule. As explained above, the leasing decision for specified lands will not be made in the forest plan. So the forest planning process simply cannot constitute adequate notification to the Bureau of Land Management of National Forest System lands that the Bureau may offer for leasing. However, due to organizational changes made in the final rule, this notice requirement is set forth in § 228.102(e) rather than § 228.103 of the final rule.

The final rule also includes a requirement to notify the Bureau of Land Management of the Forest Service leasing analysis decision identifying the National Forest System lands that will be made administratively available for leasing. As explained above, the leasing analysis decision may or may not be made in the forest plan. If it is not, the forest planning process cannot constitute adequate notification to the Bureau of Land Management of National Forest System lands that are administratively available for leasing. Also, this Department believes that giving the Bureau of Land Management notice of the leasing analysis decision will prevent confusion as to whether or not the Forest Service construes the applicable forest plan as containing the leasing analysis decision. However, the notification requirement appears in § 228.102(d) rather than in § 228.103 of the final rule.

In addition, the final rule requires notice to the Bureau of Land Management if any administrative appeals are subsequently filed challenging either the leasing analysis decision or the leasing decision for specified lands. Notice of administrative appeals of a leasing analysis decision is necessary in order for the Bureau of Land Management to evaluate the desirability of requesting that the Forest Service authorize specified lands for leasing. Notice of administrative appeals of a leasing decision for specified lands is necessary in order for the Bureau of Land Management to know with certainty that it can offer lease(s) for the lands.

It would not be appropriate to include a provision in the final rule requiring an individual who files an administrative appeal of a leasing decision to pay a filing fee which would be refunded if the appeal was successful. A requirement of this nature should be located in the Forest Service administrative appeal regulations, not in regulations governing oil and gas leasing and operations. In connection with the recent revision of the Forest Service regulations governing administrative appeals, the idea of imposing filing fees on appellants was considered and rejected. Therefore, the final rule has not been revised as suggested.

Most of the comments on this section of the proposed rule focused on the standard stipulation. As explained in the proposed rule, the role of the standard stipulation relates to the Government's compliance with NEPA in connection with offering National Forest System lands for leasing.

A number of recent court cases focus on the requirements for complying with NEPA in issuing oil and gas leases for National Forest System lands. These cases are: *Sierra Club* v. *Peterson*, 717 F.2d 1409 (D.C. Cir. 1983); *Park County Resource Council* v. *USDA*, 817 F.2d 609 (10th Cir. 1987), *Conner* v. *Burford*, 848 F.2d 1441 (9th Cir. 1988), *cert. denied sub nom. Sun Exploration & Production Co.* v. *Lujan*, ___ U.S. ___, 109 S.Ct. 1121 (1989); and *Bob Marshall Alliance* v. *Hodel*, 852 F.2d 1223 (9th Cir. 1988), *cert. denied sub nom. Kohlman* v. *Bob*

Marshall Alliance, ___ U.S. ___, 109 S.Ct. 1340 (1989). Generally, these decisions recognize that the standard lease form conveys the right to conduct operations on the lease except as otherwise provided by stipulations attached to the lease or subject to non-discretionary statutes such as the Endangered Species Act. In many of these cited cases, the courts have characterized the issuance of a lease which conveys development rights as an irretrievable commitment of resources.

The decisions holding that the issuance of a lease involves an irretrievable commitment of resources have recognized two alternate approaches that the Government can use in complying with NEPA when making a decision to offer leases. The first approach permits the Government to defer environmental analysis of lease operations when a decision is being made on issuing a lease provided that the Government retains both (1) the authority to preclude all surface disturbing activities pending the submission of site-specific operating proposals and (2) the authority to prevent all proposed operations if their environmental consequences are unacceptable. The first approach is often referred to as staged NEPA compliance. The second approach requires the Government to consider and disclose the reasonably foreseeable environmental impacts of operations that may be conducted on a lease when a decision is being made on lease issuance. Although additional NEPA compliance is required when operations on the lease are proposed, this second approach is often referred to as up-front NEPA compliance.

As explained in the preamble to the proposed rule, the standard stipulation would have allowed the Forest Service to engage in "staged" NEPA compliance. However, the Department recognized that the standard stipulation might be of concern to the industry, environmental organizations, and other members of the public. For this reason, the preamble to the proposed rule specifically requested comments on the effect of the retention of authority to deny all operations on a lease, including its effect on perceived lease value. That request was made with the understanding that the stipulation could be read by some as seriously clouding lease rights and, therefore, affecting lease values.

There were a number of comments supporting the use of the standard stipulation. However, the majority of those who offered comments on this aspect of the rule were extremely concerned as to the impact that the standard stipulation would have on the oil and gas leasing program or other resources located on National Forest System lands.

One group of those who were concerned about this aspect of the rule said that use of the proposed stipulation would substantially devalue leases. They predicted that many leases containing the stipulation would not received bids and that bid prices would be substantially lower for those lease receiving bids. They noted that the net effect of the stipulation would be to substantially reduce the revenues that the Government would otherwise receive for oil and gas leases on National Forest System lands. Some respondents noted that local economies, employment, investment, and national security also would be adversely affected.

The other group of those who were concerned about this aspect of the proposed rule opposed the stipulation because they felt it would create uncertainty as to environmental protection on leases that were issued. This group advocated that comprehensive environmental analysis be performed to ensure that leases were not issued for lands that further analysis would reveal were inappropriate for leasing and oil and gas operations.

It is important that the public receive a fair value for the leasing of its oil and gas resources. The Department believes that it is appropriate that the price received for these resources be primarily based on the nature of the resources themselves and market conditions, influenced as little as possible by Government actions and procedures. The Department also believes that comprehensive compliance with environmental statutes will serve to ensure that the environment is protected as well as bring greater certainty to oil and gas operations on National Forest System lands. Significantly, the final rule will not allow specific lands to be leased until after an appropriate environmental review indicates that development is possible somewhere on the lease (unless a no-surface-occupancy stipulation is used). Therefore, the final rule does not include the requirement that all leases for National Forest System lands include a standard stipulation reserving the authority to deny all operations on the lease.

Some of those who commented on this section requested that the final rule define other standard stipulations that will be included in all leases. They asserted that the development of such stipulations was necessary to ensure that surface resources would not be adversely affected by oil and gas operations. The Department does not agree. Experience has shown that the terms and conditions of the standard lease form, together with attached, resource-specific, lease stipulations developed in connection with the applicable forest plan and with the NEPA compliance for the leasing decision, ensure necessary environmental protection and balanced multiple use of lands. The standard lease form reserves the right to modify the location, design, and timing of proposed operations, as well as the right to control the rate of development and even to suspend operations if need be. Site-specific resources and values warranting protection are readily identified prior to leasing so that appropriate stipulations can be developed. Non-discretionary statutes such as the Endangered Species Act, which apply regardless of the standard lease form or the stipulations attached to the lease, further help ensure that oil and gas operations occur in an environmentally compatible manner. Another factor that allows the Government to see that oil and gas operations are environmentally sound is that the Government can exercise the right it has always had to deny a particular operation. Therefore, the suggestion was not adopted.

Section 228.104 Consideration of Requests to Modify Lease Terms

The proposed rule would have allowed operators to request modification of lease stipulations. It also established approval criteria and procedures for reviewing such requests.

Comments: Some respondents felt strongly that stipulations should not be waived or modified, unless a stipulation was not serving its resource protection purpose, and that waiver or modification should be the exception not the norm. It was requested that specific guidelines be established in the rule to prevent the indiscriminate use of waivers and modifications. Many said that the public and the States should be given opportunity to participate in reviews of waivers and modifications. Respondents objected to the fact that only those waivers or modifications considered to constitute "substantial modification" of a lease term would be subject to notice and appeal. They felt that the public should be given notice and the right to appeal all changes in stipulations. It was also requested that the Forest Service adopt the Bureau of Land Management approach of including a clause in stipulations that

would indicate whether public notice was required prior to approving a modification or waiver.

One reviewer questioned how waiver or modification could meet the approval criterion of being consistent with a land and resource management plan, since most stipulations are generally used to achieve consistency with plans. The same concern was expressed with respect to NEPA compliance. Some said waivers or modifications should not be done without amending the relevant land use plan. One reviewer said that if stipulations were used at the request of another agency, then that agency should have to concur before stipulations could be changed.

Others objected to the section's notice and appeal provisions, saying that providing notice in newspapers of general circulation exceeded the requirements of the Leasing Reform Act, and that there was no need to provide for appeals to decisions on stipulation modifications or waivers since they would be part of the decisions that would be made on surface use plans which are already exposed to appeal. Some said that if the lease had been issued under a prior Forest plan, and the current plan was more restrictive, only the original plan should be used for reviewing waiver or modification requests. Others requested that the rule require a 30-day response to requests for waiver or modification, with written notice given if a response could not be made during that period. It was also requested that the Forest officer make known the rationale for approving or denying a request.

Response: This section of the rule has been revised in a number of ways to be responsive to these comments. The term "substantial modification" (taken from the Leasing Reform Act) has been added to the list of definitions. Since the definition indicates that such modifications require preparation of environmental documents, the public is ensured an opportunity to participate in the review of substantial modifications.

The final rule defines the terms "modification" and "waiver," and adds the term "exception" to better characterize and distinguish between the different actions that can be taken with respect to stipulations. The terms are defined consistent with both Forest Service and Bureau of Land Management field office usage. The terms indicate that exceptions are fairly minor and would rarely constitute a substantial modification. An example of an exception to a stipulation would be allowing drilling activities during a mild winter in an area that had been stipulated to be closed for elk winter range purposes during more severe winters.

With respect to questions concerning consistency with plans, it is likely that most stipulation modifications and waivers will not be consistent with forest plans. Thus, the authorized Forest officer will have to decide whether to amend the plan to permit the modification or waiver. However, exceptions will sometimes be consistent with plans, and may be processed without preparation of new NEPA documentation since the environmental protection standards involved would not actually be changing.

With respect to notice and appeal opportunities, the final rule establishes that requests for waivers, modifications, or exceptions to stipulations can only be made at the time operations are proposed. Therefore, notice of "substantial modifications" will be given to the public concurrently with, and in the same manner as, the notice that operations have been proposed. Similarly, appeals of stipulation changes will have to accompany appeals concerning proposed operations.

Finally, the rule does not establish a definite period for review of requests for waiver, modification, or exceptions of lease stipulations since such a request must be made a part of a surface use plan of operations or supplemental plan for which processing time is specified.

Section 228.105 Operator's Submission of a Surface Use Plan of Operations

The proposed rule provided that an operator must submit a surface use plan of operations through the appropriate Bureau of Land Management office, and encouraged cooperation between the operator and the Forest Service. This section also identified requirements for the content of a surface use plan of operations.

Comments: Respondents on this section generally felt that the Forest Service was "reinventing the wheel." Nearly all of the comments strongly urged the Forest Service to delete this section and adopt the Bureau of Land Management's Onshore Oil and Gas Order No. 1 and operating procedures. They felt that the Order contained a framework with which operators and agency personnel alike were already familiar. Respondents said that the Bureau of Land Management's operating procedures had worked well in the past in managing the oil and gas program. General observations were provided to substantiate that the proposal was either inadequate or unnecessary. Some felt that the Forest Service had ignored Order No. 1 and had contradicted the statement made in the preamble that the proposed regulation was consistent with the Bureau of Land Management's procedures and would not require new procedures.

Response: The Department agrees with those recommending use of Onshore Oil and Gas Order No. 1; however, there may be situations requiring separate Orders to be issued for the National Forest System. Therefore, the final rule would allow the Chief of the Forest Service to issue or co-sign Onshore Oil and Gas orders. Until such time as the Forest Service issues a replacement order, the rule adopts that portion of the Bureau of Land Management's Onshore Oil and Gas Order No. 1 of October 21, 1983, published at 48 FR 48916–30 pertinent to the authorities that the Leasing Reform Act gave this Department. When the Forest Service proposes Onshore Orders, they will be available for public comment through **Federal Register** publication.

Comments: Comments from the oil and gas industry identified numerous deficiencies in the proposed requirements for submission of a surface use plan. For example, the term "access facilities" proved to be confusing. The interpretation by industry and other groups who commented was that the term "facilities" actually meant roads, not facilities. One respondent stated, "These items are not ancillary by definition and thus, should not be included in the final regulation." A complaint of some respondents was the omission of the requirement for an operator to have the lessee's approval for conducting operations. They felt this requirement had been, and would continue to be, a critical element for agency review of any surface use plan. Another concern was that nothing had been included in the proposal for construction materials, or for the location of water supply, which the reviewer said has been an important factor in obtaining project approvals on National Forest System lands for the oil and gas industry. An oil and gas industry representative felt that the proposed content of the surface use plan did not require surface ownership information. This respondent said that given the amount of private in-holdings within Forest Service areas, surface ownership would be a critical piece of information needed to complete the issuance of a special-use permit for a right-of-way.

Response: As explained in connection with the responses to comments on § 228.105 of the proposed rule, this Department has decided to adopt the portion of Onshore Oil and Gas Order

No. 1 governing the content requirement for a surface use plan of operations. Onshore Oil and Gas Order No. 1 contains specific requirements which resolve all or the concerns noted in the comments. While the Forest Service may issue of cosign future orders altering the requirements of Onshore Oil and Gas Order No. 1, those orders will be subject to public comment prior to their adoption.

Comments: Comments on this section also included an observation that if the supplemental plans are subject to the same requirements as an initial surface use plan of operations, it follows that the decision(s) will be appealable and subject to stay. This respondent advised the Forest Service against creating opportunities to stay technically critical operations without ensuring the opportunity for independent technical review. It was also suggested that the supplemental plan be required to discuss only the proposed changes to the original surface use plan rather than to restate the entire original plan as is implied.

Response: This section applies to surface-disturbing operations that require approval. The technically critical operations referred to by the reviewer are for down-hole operations and do not involve the Forest Service. As for appeals and stays, the Department feels that a revision to an approved plan that is not within the scope of the original proposal must be subject to the appeal and stay provisions. This section has been revised to clarify that supplemental plans must be authorized in the same manner as the original plan. The only authorization for which a supplemental plan must be submitted is for those not authorized by the original plan. The original plan would remain in effect and need not be resubmitted which should eliminate any redundancy or repetition.

Section 228.106 Review of a Surface use Plan of Operations

The proposal established the process by which the Forest Service would review a surface use plan of operations, including specification of time periods, factors to be considered, and content of decision notice.

Comments: Numerous comments centered around NEPA compliance such as cumulative impacts, adequate analysis, and environmental impacts. Many recommended that reference to Forest Service Manual Chapter 1950 and Forest Service Handbook 1909.15 be deleted because this material should not be codified as part of the regulation since the procedures were not subject to the Administrative Procedure Act.

Response: The final rule requires that the Forest Service comply with NEPA before approving proposed surface disturbing operations. After reviewing a proposal to conduct operations, the Forest Service will prepare a site-specific environmental document that considers the reasonably foreseeable environmental consequences of the proposal. This document will include a discussion of the responsibility of the Forest Service to regulate surface disturbing activities and its authority to approve or disapprove the particular proposed plan of operations in view of the possible impacts on surface resources. The environmental document will also identify any conditions the Forest Service will include, if approving the proposal, to provide for mitigation of possible adverse environmental impacts on surface resources, and for required reclamation.

Forest Service Manual 1950 and Forest Service Handbook 1909.15 provide the internal direction to Forest Service employees on NEPA compliance, environmental analysis, and documentation. In accordance with Council on Environmental Quality regulations, this manual and handbook were adopted after notice and comment through **Federal Register** publication. This satisfies the Administrative Procedure Act. Therefore, reference to these materials is retained in the final rule.

Comments: Another area of concern was the issue of public input. One individual recommended that an opportunity for public and agency input be provided early in the process to ensure identification of controversial issues prior to making a determination on the adequacy of the surface use plan. Many were concerned that "as written, the only substantive opportunity for public input (under this section) would be through the appeal process." It was felt that early coordination was critical in instances where an agency's regulatory program applied to lease activities. Another respondent felt that it was unclear whether State or Federal agencies would have the opportunity to review the plan of operations and to suggest modifications.

Response: The Leasing Reform Act requires a minimum 30-day public posting at Forest Service offices prior to approval of a drilling permit. This requirement is reflected in Section 228.115 of this regulation. It should be kept in mind that the public will have already participated and voiced its concerns prior to leases being issued at the time operations are proposed, the rule requires consistency with Forest plans and with lease stipulations, all of which has already received public input. Therefore, the final rule has not been revised.

Comment: Most respondents commenting on this section felt that the surface use plan of operations should be reviewed for consistency with the Forest land and resource management plan in effect at the time of leasing, not the current plan. Others said they were pleased that the approval of a surface use plan would be based on the current resource management plan.

Response: In response to these comments, this section has been revised to make it clear that the current forest plan will be used in the review of a proposed surface use plans of operation. The National Forest Management Act requires that the current plan govern all uses of National Forest System lands, subject to valid existing rights. Unless doing so would be contrary to the valid existing rights conveyed by an oil and gas lease, the authorized Forest officer shall require that any proposed operations be conducted in a manner consistent with the direction in the forest land and resource management plan in effect at the time that a surface use plan of operations is approved. This may require the authorized Forest officer to condition approval of a surface use plan on factors such as the modification of the sitting, design, or timing of proposed operations. If there is a conflict between the rights conveyed by an oil and gas lease and a subsequently adopted forest land and resource management plan, the authorized Forest officer may choose to enforce that forest plan, recognizing that this may subject the Government to appropriate legal action by the lessee, or the officer may choose to enforce the forest plan that was in effect when the lease was issued.

Comments: Many respondents commented on the time periods referred to in the proposed rule. A majority of those commenting on this section felt that there should be a maximum time limit for Forest Service response, others suggested different time periods. Some felt the time limitations would not be consistent with the NEPA process, while others wanted the phrase "as soon as practicable defined." Others asked for notification to the operator of any delay in approval.

Response: After analyzing these comments, the proposed rule has been revised to be responsive to the comment requesting notification to the operator. The final rule reflects a 3-day notice requirement after the 30-day period provided by 30 U.S.C. 226(f). This is consistent with requirements of the

Bureau of Land Management, thus providing for interagency consistency and flexibility for land managers when circumstances warrant it. To adopt a maximum time limit would place the authorized Forest officer in a position of probably not meeting regulation requirements everytime NEPA documentation was necessary and, therefore, it was rejected. Because of varying circumstances, it is impossible to define the phrase "as soon as practicable" and it is retained in the final rule to allow the authorized Forest officer some management flexibility.

Comments: Others were concerned with the signing of the plan after approval stating that the plan was signed by the operator when submitted and requiring resigning could create additional delays.

Response: The Department partially agrees with these comments and has revised this section to require signature only when the Forest Service requires conditions of approval. Signature by the operator is necessary to ensure that the operator agrees with such conditions.

Comments: Many respondents referred to the statement "posting of the required bond" as a "condition of approval" and recommended that the phrase be deleted or clarified since it was illogical that operators would be given 30 days to sign bonds that they had already signed before submitting.

Response: This provision was included in the proposed rule to ensure that a bond to protect the Government is in effect before the operations began. However, given other changes that have been made in the final rule, this provision is not necessary to protect the Government.

As explained in connection with the responses to comments on § 228.108 of the proposed rule, the Forest Service has generally decided to rely on the Bureau of Land Management to hold and administer bonds to protect surface resources of National Forest System lands. The Bureau of Land Management requires that evidence of an acceptable bond coverage must be submitted as part of an application for a permit to drill. Persons seeking to conduct operations generally have satisfied this requirement by submitting a copy of a signed bond as part of their application for a permit to drill. Thus, unless the Forest Service determines that the bond submitted as part of the application for a permit to drill is inadequate to satisfy the Leasing Reform Act requirements, the required bond will already have been signed and posted when the Forest Service acts on the surface use plan of operations. If the Forest Service does require additional bond coverage beyond that submitted as part of the application for a permit to drill, the approval of the plan of operations will be subject to posting of an adequate bond. Therefore, the provision regarding the signature and posting of the bond included in the proposed rule has been removed.

Comments: Several respondents expressed strong opinion concerning the public notice provisions of this section. Comments included both support for giving notice, as well as opposition. Some thought the planning process provided ample opportunity for the public to participate, while others thought the notice should be expanded to a newspaper of general circulation and publication in the Federal Register. Also noted was that the citation for appeal in this section should be changed to reflect the new Forest Service appeal procedures.

Response: The notice provisions have not been revised. Notice will be given in accordance with procedures used by various Forest Service offices. In some cases, this may involve local newspapers, in others it may be limited to posting in the front office and mailings to interested parties. With respect to appeals, since publication of the proposed regulation, the Secretary has adopted revised Forest Service appeal regulations, 36 CFR parts 217 and 251, subpart C, which provide procedures for notifying the public of appealable decisions. Therefore, notice requirements are not necessary in this rulemaking. This section has been revised to reflect the new Forest Service appeal regulations.

Section 228.107 Surface Use Requirement

This section of the proposed rule specified certain basic operating parameters to guide the conduct of oil and gas operations on the National Forest System. The parameters essentially reflected what has become commonplace requirements for all commercial interests using the Forest System and, in the case of oil and gas, are already authorized under the terms and conditions of the standard lease form.

Comments: The majority of comments said that this section was not necessary and that if the requirements were not already addressed in the standard lease form, Operating Order 1, or Forest plans, etc., they should be attached to leases as stipulations or else attached to permits to drill as conditions of approval.

Some said the section used vague terms such as "unnecessary and unreasonable," "riparian areas and wetlands," and "steep slopes," and would establish criteria that would make implementation of the standards impossible. It was also said that including the requirements in the rule was inappropriate, that is would eliminate flexibility of local managers to adjust requirements to site-specific conditions, including the modification on waiver of lease stipulations when warranted, and would prevent the exercise of sound judgment.

One reviewer said that the Forest Service had avoided its responsibility to set nationwide standards by claiming that site-specific conditions were too diverse to specify these standards in the rule. Another concern was that the rule would allow impacts to resources if such impacts were deemed "necessary" regardless of whether such impacts were environmentally acceptable. It was recommended that the term "unnecessary" be removed as a qualifier and that a definition for "unreasonable" be added that would be similar to that used in section 403(c) of the Clean Water Act which defines "unreasonable" degradation as a significant adverse change in ecosystem diversity, productivity, and stability of the biological community within the area of discharge. With such a change, this reviewer felt that the basis for approval of operations would properly be their environmental impact and not whether or not they were "necessary."

Other reviewers supported this section. However, some said that the rule should make it clear the Forest Service retains authority to require additional operating and reclamation measures after approval of operations if necessary to address unforeseen site-specific contingencies. One party said the rule should contain requirements for cultural resource clearances and that the guidelines should be the same as those appearing in the Bureau of Land Management's Onshore Order No. 1.

Finally, there were numerous comments recommending various word changes and/or expressing preferences for additional requirements that should be included in this section.

Response: The Department is aware that establishing requirements in the oil and gas rules may not be totally necessary, since some of the requirements may be redundant of those stated elsewhere in chapter II of title 36 of the Code of Federal Regulations, in Operating Orders, or in rules issued by the Bureau of Land Management. However, the purpose of including these requirements in the rule is to consolidate in one place the minimum requirements so that the public is fully

informed of the manner by which the Forest Service will interpret and administer its responsibilities for regulating surface-disturbing oil and gas activities under the Leasing Reform Act. The proposed rule accurately conveyed that interpretation and, therefore, only minor changes have been made in the final rule. Comments and suggestions have either been incorporated or rejected based on consistency with that interpretation.

Section 228.108 Bonds

The proposed rule established that bonding would be required before surface disturbing activities could be authorized and required the authorized Forest officer to assure the bond amount being held by the Bureau of Land Management would be adequate to ensure timely and complete reclamation.

Comments: Considerable opinion was expressed with respect to requiring bond coverage equal to that of full reclamation costs on each lease. It was claimed that there was no basis for requiring such coverage since many years of actual experience had shown that the bond amounts required by the Bureau of Land Management were adequate to ensure reclamation. One reviewer said, "The proposal reflects a misunderstanding of the nature of the bonds as a surety instrument. Bonds are performance guarantees, not replacement cost insurance policies."

It was pointed out that the Leasing Reform Act itself provides adequate assurance that reclamation would occur in that it prohibits lessees from conducting operations on other Federal leases if they fail to reclaim lands properly. Many said that full coverage bonds would virtually eliminate independents and less capitalized operators from drilling within the National Forest System since they would be unable to afford them. It was said that requiring bonds for each surface use plan would be wasteful of industry capital, costly for the Government to administer, and unnecessary in terms of protecting the environment.

Although one reviewer felt that the Bureau of Land Management's approach to bonding was inadequate and should not be used as a model, the majority recommended that the Forest Service rely on existing Bureau of Land Management bond coverage and amounts. It was felt that if larger bond amounts were deemed necessary on a case-by-case basis, this too could be accomplished through the Bureau of Land Management bond procedures. One reviewer suggested the following bond language be adopted:

As part of the review of a proposed surface plan of operations, the authorized Forest officer shall determine, based on a review of an operator's reclamation history, if additional bonding is required over amounts currently on file with the Bureau of Land Management for any plan of operations that the authorized Forest officer proposes to approve. If additional bonding is necessary, bonds, sureties, or other financial arrangements required by the Forest Service shall be filed and posted with the Bureau of Land Management. The Forest Service shall not require additional bonding unless the operator has a history of failure to comply with reclamation requirements.

It was noted that the rule provided only for bonds, that it did not allow for financial arrangement such as certificates of deposit, letters of credit, and third-party guarantees to satisfy this requirement. There were questions as to whether Statewide or Nationwide bonds were acceptable, whether the bond was to cover rents, royalties, and other payments, and whether separate bonds still had to be filed with the Bureau of Land Management and, if so, which bond covered what. Clarification was requested as to who could file the bond.

It was suggested that schedules for the staged release of bonds as reclamation proceeded should be developed. It was also recommended that, in addition to notifying the Bureau of Land Management when bond amounts were being reduced that the operator also be promptly notified. Other comments advocated that bonds not be reduced without first consulting with the Minerals Management Service and the Bureau of Land Management to verify that there are no outstanding obligations under the bond.

It was suggested the word "re-evaluate" be used in place of "recalculate" to describe the action that is taken when a supplemental plan of operations is submitted, since recalculation implies that a change in the bond amount is automatically necessary. One respondent said recalculation should be done only when unanticipated circumstances develop and the operator is at risk. Another said that there should be periodic recalculation to adjust for inflation.

A proposed addition to the rule was made suggesting that it contain criteria to guide the setting of bonds that the criteria should be such that public funds would not have to be used even in the event of a "worst case" situation, and that establishing criteria would foster consistency between Forests. One respondent recommended language as follows:

An adequate amount is one that is equal to the independently contracted cost of prompt and timely restoration of any lands and waters adversely affected by surface-disturbing operations, including administrative costs.

Finally, it was recommended that there be a sharing of reclamation security arrangements with State or local bodies, and that this should be done in the bond itself and not left to a Memorandum of Understanding.

Response: The Bureau of Land Management has traditionally obtained and administered bonds for oil and gas operations on Federal leaseholds within the National Forest System. Those bonds have covered both surface and subsurface contingencies. Under the authority of the Leasing Reform Act, the Forest Service could promulgate a rule requiring that a bond be posted with the Forest Service for surface contingencies. However, if the Forest Service did so, the Bureau of Land Management would nonetheless have to obtain its own bond to cover subsurface contingencies. This duplication of effort in the administration of bonding for an operation is undesireable from the standpoint of the Government as a whole, particularly since the beneficiary of both bonds would be the same—the United States. Having two agencies administer bonds for a single operation also does not serve the interests of the public or the oil and gas industry. In view of this, the Forest Service has decided that the most orderly and efficient course is to promulgate a regulation which permits the Bureau of Land Management to continue to administer bonds for National Forest System lands that cover both surface and subsurface contingencies.

However, the Leasing Reform Act assigned a new responsibility to the Secretary, and that is to ensure there is an adequate bond, surety, or other financial arrangement established prior to the commencement of surface-disturbing activities on any lease, to ensure complete and timely reclamation of the lease tract and the restoration of any lands or surface water adversely affected by lease operations after the abandonment or cessation of oil and gas operations on the lease. In addition, the Lease Reform Act requires the Secretary of Agriculture to determine that an entity is not entitled to future leases or lease assignments if such entity is in material noncompliance with reclamation standards.

The Bureau of Land Management's bonding regulations appearing at 43 CFR part 3104 require minimum bonds of $10,000 for individual lease coverage, $25,000 for Statewide coverage, and $150,000 for nationwide coverage; however, these amounts can be

increased at any time (on an operator-by-operator basis) if such action appears warranted. The fact that larger amounts have rarely been required and that reclamation has still been accomplished is testament to the adequacy of the procedures used by the Bureau of Land Management.

Following the close of the comment period on the proposed rule, the Forest Service conducted a survey of its field offices to ascertain whether during the past 5 years there had been any need to attach bonds in order to obtain reclamation or restoration and, if so, whether the bond amounts involved proved adequate for the work to be done. In fact, during this period, the Forest Service has never found reason to attach a bond. The survey responses confirmed that no bonds or any funds appropriated to the Forest Service had been used to obtain reclamation. The survey included approximately 500 well sites. Also, the Department is not aware of any reports or studies showing that bond amounts traditionally required for oil and gas operations on National Forest System lands have not been adequate. Based on this experience, the Department does not believe it necessary or cost effective for the Forest Service to obtain and administer bonds for surface-disturbing operations on the National Forest System or that required bond amounts necessarily increase in order to ensure timely and complete reclamation and restoration, particularly since historic bond amounts have always been adequate to ensure such performance. In addition, the Leasing Reform Act imposes a new and severe penalty on operators who are found in material noncompliance with reclamation standards, that being a prohibition on obtaining new leases or getting lease assignments.

Therefore, after careful consideration of all comments received, it has been decided to continue to rely upon the bonds filed with the Bureau of Land Management. However, the final rule has been revised to require that the authorized Forest officer inform the Bureau of Land Management if at anytime a larger bond amount is deemed necessary. In response to those comments addressing the need for bonding standards, the final rule has been amended to indicate factors which the authorized Forest officer will consider when estimating the cost of reclamation. In addition, the final rule indicates that the authorized Forest officer will notify the Bureau of Land Management when reclamation liability is reduced and requirements for increased bond amounts can be reduced. Finally, it should be noted that the Forest Service and the Bureau of Land Management have recently entered into a Memorandum of Understanding that provides the framework for utilizing the Bureau of Land Management's bonding provisions.

Section 228.109 Indemnification

This section of the proposed regulation would provide a means of protecting the United States from liability as a result of claims, demands, losses or judgments caused by an operator's use or occupancy.

Comments: Those commenting on this section thought that the section should either be eliminated in its entirety or revised. Those who thought it should be deleted provided the following rationale: One said that existing law established the liability of the lessee to the United States for any damage done in the course of a lessee's operation. Two stated generally that the provision is against the public interest and would drastically reduce exploration and development on National Forest System lands, because it would deter joint operations.

Several respondents recommended changes. Two respondents suggested that the rule state that only lessees of record are liable for lease obligations, and only to the extent of their respective, undivided interests in a lease. One thought the correct approach would be to limit the liability to the operator alone. One additional respondent simply asked questions relating to an operator's liability for fires, erosion, etc., caused by natural occurrences.

Responses: After analysis of these comments, the Department has decided not to revise the proposed rule. Granted, existing law may provide for the liability of a lessee to the Federal Government for any damage done in the course of the lessees operations, but we see no reason why indemnification should not be restated in this rulemaking to ensure all of those concerned understand and are aware of the Federal Government's position. The comment that this provision is against public interest and will adversely reduce exploration is hard to understand. Indemnification is a normal business practice and any lessee entering into a joint agreement may indemnify themselves if they so choose. Concerning the question as to who is liable, it is up to the lessee to structure agreements with transferees and operators that provide for the lessee's protection as to limits of liability. In response to the question on an operator's liability for damage due to natural occurrences, the operator has no liability for acts of nature.

Section 228.110 Temporary Cessation of Operations

This section of the rule required operators to notify the authorized Forest officer in the event that operations were to be temporarily interrupted for a period of 45 days or more. The purpose of requiring notice was to allow the Forest officer an opportunity to specify interim reclamation or erosion control measures to stabilize the site.

Comments: Comments on this section were either supportive or requested minor change. Two respondents recommended changing the time period from 45 days to 60 days to conform with the 60-day cessation of production period provided for in Bureau of Land Management rules at 43 CFR 3107.2. Another recommended a statement be included indicating that these requirements were in addition to those contained in rules issued by the Bureau of Land Management requiring monthly reports on wells, and filing of requests for suspension of operations or production. One reviewer said that a paragraph should be added exempting operators from having to file statements if cessation resulted from forces or events outside their control, such as a pipeline curtailment or a labor work stoppage. Finally, it was requested that the rule indicate that only "necessary" reclamation or erosion control measures would be required by the Forest officer.

Response: While consistency with the Bureau of Land Management is desirable, in this case, the needs of the Forest Service are different from those of the Bureau of Land Management. The Bureau of Land Management requirements involve reports that are filed after a period of time has elapsed, or that contemplate something more than a temporary cessation of operations, and they are oriented toward downhole concerns. The proposed rule was intended to allow expedited action to be taken to protect surface resources during a period when activities would cease.

The final rule has been clarified to indicate that operators are to provide notice to the Forest officer as soon as it becomes apparent there will be a cessation of operations lasting 45 days or longer. The suggestion that a force majeure provision be included was not adopted, since the Department disagrees that the particular events cited should delay protection of surface resources. The word "necessary" was not added to the rule because adopting this change would imply that the authorized Forest

officer might otherwise require unnecessary measures.

Section 228.111 Compliance and Inspection

This section of the proposed rule would advise the public of the requirements with which an operator must comply in conducting oil and gas operations. It would provide for Forest Service inspection of the operations for the purpose of determining whether those operations were being properly conducted and whether reclamation of the operations had been satisfactorily completed. This section also would direct the Forest Service, upon determining that operations were not in compliance with reclamation requirements or other standards, to seek the operator's voluntary correction of the noncompliance. Finally, the section would specify that noncompliance could subject an operator to specified corrective procedures.

Comments: Most of the comments with respect to this section focused on the provision directing the Forest Service to seek an operator's voluntary correction of noncompliance.

Many of those who commented wanted the voluntary correction of noncompliance procedure to be more formal. Those respondents recommended that the rule specify the number of days an operator would have to bring the operations into compliance, to require that Forest Service give written notice of the deadline for voluntary compliance, and to provide for extension of the deadline for voluntary correction of noncompliance.

Many others who commented were concerned that the voluntary correction of noncompliance procedure coupled with the compliance related procedures in §§ 228.112 and 228.113 of the proposed rule would not ensure that expedient action would be taken to remedy instances of noncompliance. This group said the proposed rule provided an operator too many opportunities to delay bringing operations into compliance and that there was no incentive to comply before all of these opportunities had been exhausted. One respondent suggested these problems could be remedied by imposing fines on the operator for any period that the operations are in noncompliance. Several other respondents advocated the deletion of the voluntary correction of noncompliance procedure. These respondents recommended that the final rule require that a notice of noncompliance be issued as soon as the Forest Service determines that the operations are not in compliance with an applicable requirement. It was noted that in the early 1980s the Bureau of Land Management had used a similar compliance program involving an informal method of remedying noncompliance but that this system had to be abandoned when "it did not satisfy anyone involved." This comment also noted that dropping the voluntary correction of noncompliance procedure would foster consistency in the manner in which the Forest Service and the Bureau of Land Management would handle instances of noncompliance on the lands that each agency administers.

A number of the comments on this provision also recommended that the term "come into compliance" be clarified so that an operator is not penalized excessively if he takes steps to correct the problem but reclamation will not be completed until the end of the growing season.

Response: Based upon these comments the Department has concluded that the voluntary correction of noncompliance procedure should not be retained in the final rule. Formalizing the procedure by giving written notice of deadlines for voluntary correction of noncompliance and an opportunity for extension of those deadlines would result in duplication of the notice of noncompliance procedure included in § 228.112 of the proposed rule. Needless damage to surface resources could result if an operator refused to take corrective action while two formal noncompliance procedures were exhausted. However, the Department recognizes that operators are entitled to features such as written notice of noncompliance and an opportunity to obtain extensions of deadlines for coming into compliance because noncompliance can have consequences such as imprisonment, criminal fines, ineligibility for future leases or assignments, and suspension of operations. The appropriate balance between these concerns is to provide one formalized noncompliance procedure. This will ensure both prompt corrective action to prevent unnecessary resource damage and fairness to the operator. Having only a formal notice of violation procedure also results in more consistency between the Forest Service noncompliance process and the Bureau of Land Management noncompliance process.

While this rule removes the voluntary compliance provision, the Department wants to emphasize that the Forest Service is committed to working cooperatively with operators and lessees in administering surface use plans of operations to avoid the likelihood of noncompliance and the necessity of initiating noncompliance proceedings.

The comments that the term "come into compliance" be clarified are addressed under responses to comments on § 228.113 of the proposed rule.

Comments: A number of people were concerned over the possible overlap of responsibilities between the Forest Service and the Bureau of Land Management in determining whether operations on Federal oil and gas leases were in compliance with applicable requirements and thought the role for each agency should be defined. These individuals requested that the rule require that the Forest Service enter into a Memorandum of Understanding with the Bureau of Land Management to provide for appropriate coordination of surface and subsurface compliance responsibilities. It also was strongly recommended that the Forest Service utilize the Bureau of Land Management's Notices to Lessees and Onshore Operating Orders to the fullest extent possible. Respondents said that operators are well acquainted with these, and noted that in the past those notices and orders have been used in conjunction with oil and gas activity on both Bureau of Land Management and Forest Service administered lands.

Response: The Department shares the respondents' concern that the Forest Service and the Bureau of Land Management work cooperatively in administering oil and gas operation on National Forest System lands. The rule is written to avoid overlap and better define the roles of each agency. The Forest Service and the Bureau of Land Management have always worked cooperatively in administering federal oil and gas operations on National Forest System lands. The Forest Service also has entered into a Memorandum of Understanding with the Bureau of Land Management concerning federal oil and gas resources on National Forest System lands to further the objective of closely coordinating oil and gas administration in the future. The final rule allows the use of Onshore Orders and Notices suggested by the respondents.

Comments: Several comments related to the provision for determining whether reclamation of operations had been satisfactorily completed. One respondent suggested that the emphasis of this section should be consistent with Bureau of Land Management requirements, i.e., that the operator gives the Bureau of Land Management and the Forest Service prompt written notice whenever reclamation is complete by filing a final abandonment notice. Another respondent requested that

procedures should be adopted for partial release of a bond when reclamation of a portion of an area affected by the surface operations has been satisfactorily completed.

Response: The final regulation as written does not prevent the use of an abandonment notice. The Forest Service will consider use of abandonment notices and, if considered useful, will allow for such notices in an operating order.

A provision in § 228.108 of the proposed rule provided for the partial release of a bond when reclamation on a portion of the area of operation was satisfactorily completed. A similar provision is included in the final rule.

Comments: Several respondents stated that the Mineral Leasing Act should be used at the authority for establishing penalties for noncompliance since the noncompliance involved stemmed from authorizations granted under the Mineral Leasing Act.

Response: While the mineral leasing laws are being relied on for the promulgation of this regulation, the general authorities applicable to the administration of National Forest System lands are also being relied on. Pursuant to those general authorities, this Department has adopted regulations set forth at 36 CFR part 261 which establish penalties for prohibited conduct on National Forest System lands. The proposed rule provided that these penalties would apply to operations conducted on National Forest System lands in connection with oil and gas leases.

This Department sees no impediment to the use of the regulations at 36 CFR part 261 to govern mineral related operations on National Forest System lands. Presently, the provisions set forth at 36 CFR part 261 are used by this Department in connection with the regulation of surface disturbance caused by locatable mineral operations on National Forest System lands. The courts have consistently upheld the use of the penalties set forth at 36 CFR part 261 in that setting. Nothing in the Leasing Reform Act or the mineral leasing laws generally prohibits the Department from using the provisions of 36 CFR part 261 in connection with the regulation of oil and gas operations on National Forest System lands.

Since this Department wishes to establish a uniform system for regulating surface disturbance caused by mineral operations, whether those operations be to develop locatable minerals or oil and gas resources, the suggestion was not adopted.

General: There were numerous other technical suggestions, some of which were incorporated into the final rulemaking.

Section 228.112 Notice of Noncompliance

The proposed rule would establish formal procedures to be followed by the Forest Service in the administration and issuance of a Notice of Noncompliance. The proposed rule also would establish remedial actions that the Forest Service could take if an operator failed to comply with a notice of noncompliance. Those remedies would include referring the matter to a compliance officer, suspending a surface use plan of operations or taking action to abate an emergency.

Comments: A number of respondents were concerned that the notice of noncompliance procedure in this section coupled with the compliance related procedures in §§ 228.111 and 228.113 of the proposed rule were too cumbersome to ensure that expedient action would be taken to remedy instances of noncompliance. This group said the proposed rule provided an operator too many opportunities to delay bringing operations into compliance and that there was no incentive to comply before all of these opportunities had been exhausted. Several of these respondents recommended that the final rule require that a notice of violation be issued as soon as the Forest Service determined that the operations were not in compliance with an applicable requirement.

Response: As explained in the response to comments on § 228.111 of the proposed rule, the Department has decided that the voluntary correction of noncompliance procedure included in the proposed rule should not be retained in the final rule. Consequently, notices of noncompliance will be issued when operations are determined to be in noncompliance with applicable requirements.

With the omission of the voluntary correction of noncompliance procedure, the Department believes that the final rule will ensure that an operator will be required to take timely actions to remedy instances of noncompliance. The procedures included in this section of the proposed rule must be retained to guarantee that operators have a fair opportunity to come into compliance since noncompliance can have very serious consequences including imprisonment, criminal fines, ineligibility for further leases or assignments, and suspension of operations. Therefore, the only changes that have been made in this section in response to these comments are minor adjustments necessary to reflect the omission of the voluntary correction of noncompliance procedure contained in the proposed rule.

Comments: Many of the comments focused on the fact that the proposed rule did not include a definition of the term "material noncompliance." One of those respondents suggested that the rule either include criteria to be used to decide whether noncompliance is material, or make it clear that this decision is totally within the discretion of the compliance officer. Another respondent suggested that since material noncompliance was not defined, problems regarding the consistency of material noncompliance determinations would arise.

Response: The Department does not agree that a definition of the term "material noncompliance" is required to guarantee consistent decisions. The high level of review required for noncompliance proceedings coupled with the restriction on the number of people who can serve as compliance officers ensures consistency.

It is virtually impossible to define "material noncompliance" to cover all the possible situations that could occur. The proposed rulemaking presented examples of noncompliance to which the authorized Forest officer can refer. The diversity of the environment from one area to another necessitates that the authorized Forest officer make decisions that a noncompliance for a particular operation may be material while the same noncompliance of another operation may not be. These examples provide guidance as to whether or not noncompliance may be material and therefore should be referred to the compliance officer.

Comments: A number of comments focused on the provision in the proposed rule which require the Forest Service to suspend approval of a surface use plan of operations if noncompliance was resulting in an imminent danger to public health or safety or in irreparable resource damage. Several respondents asked for clarification as to whether the intent was to suspend the operations rather than the approval of the plan of operations. It was stated that suspension of the approval of the plan of operations would not be appropriate since an operator arguably might be relieved of the obligations imposed by the plan of operations for the duration of the suspension. Other respondents thought that the criteria for a suspension were overly restrictive. For example, several respondents asked that the rule provide for a suspension whenever the noncompliance may result in danger to public health and safety or irreparable

resource damage. Other respondents stated that suspension is appropriate whenever resource damage is occurring regardless of whether that damage is irreparable. Finally, two respondents suggested that the rule provide for appeals of decisions relating to suspensions.

Response: The intent of the suspension provision included in the proposed rule was to obtain a cessation of the particular operations that were endangering public health or safety or causing irreparable resource damage. It was thought that an appropriate means of obtaining the cessation would be to suspend the approval of the plan of operations since the conduct of operations following a suspension would trigger a material noncompliance proceeding.

However, based upon the comments, the Department has determined that the better approach would be for the final rule to permit the authorized Forest officer to issue an order directing the operator to suspend operations meeting the specified criteria. This approach is a more direct means of obtaining a cessation of operations and avoids ambiguity as to whether the operator is responsible for meeting other obligations specified by the approved plan of operations. Therefore, the final rule provides for a suspension of operations rather than a suspension of the approval of a surface use plan of operations.

The Department also agrees in part with the respondents who stated that the suspension criteria set out in the proposed rule were too narrow. A suspension of operations should be possible whenever it is likely that noncompliance is a danger to public health or safety rather than only when noncompliance is resulting in imminent danger to public health or safety. Similarly, a suspension of operations should be possible whenever it is likely that noncompliance is likely to result in irreparable resource damage rather than only when noncompliance is resulting in irreparable resource damage. However, the Department does not agree that a suspension of operations is appropriate whenever any resource damage is likely to occur. Unless resource damage is likely to be irreparable, other provisions of the regulation including the bonding requirements are adequate to ensure that any resource damage which may result from noncompliance is remedied. Another reason that it would be inappropriate to permit suspensions when reparable resource damge might result is that a suspension which affects downhole production can reduce the ability to recover oil and gas resources from the reservoir.

With regard to the comments on the appealability of suspension decisions, it is not the purpose of this rule to establish the appealability of decisions. The Forest Service regulations defining the categories of appealable decisions and the procedures for those appeals are set forth at 36 CFR part 217 and 36 CFR part 251, subpart C. Those regulations would allow an operator to appeal a suspension decision. In connection with the promulgation of those regulations, the Department determined that it would not be in the public interest to permit parties who are not in privity with the government based on a legal instrument such as an oil and gas lease to appeal decisions pertaining to the day to day administration of that instrument. Accordingly, no change in the final regulation relating to appeals of a suspension decision has been made.

Section 228.113 Material Noncompliance Proceedings

The proposed rule established the procedures for determining whether noncompliance is material and, if so, for the withdrawal of the material noncompliance determination once the operations are brought into compliance.

Comments: As stated in § 228.112, Compliance and Inspection, and Section 228.101, Definitions, the focal point of concern was the lack of definition for "material" noncompliance. More than half of the comments that addressed this section expressed a strong desire that this term be defined and clarified in the final regulation. One respondent indicated that it would appear that reclamation standards and requirements would have to be established by regulation in order to define the term "material" noncompliance. One felt that "other standards" should be defined as well, and explicitly so there is no doubt in anyone's mind what "other standards" are, since "they are clearly not reclamation requirements."

One respondent also stressed that material noncompliance proceedings should be as expeditious as possible, and during the proceedings, the operations of the violators should be suspended.

At least one respondent felt that it was not clear whether the issue of "materialness" would be brought up in the noncompliance proceedings. It appeared to most that the compliance officer would independently make this determination on the basis of the information furnished by the authorized Forest officer. Many felt this needed clarification.

Response: The response on defining "material" was previously addressed in § 228.111. The final regulation does not define "other standards," because other standards would necessarily vary from National Forest to National Forest depending on resources and values present.

With respect to the process being time consuming, we believe that the severity of the penalties warrant a careful approach. As for suspending operations, operations would be shut down in cases where an operator was operating without an approved surface use plan of operations or if the operations were causing an imminent danger to public health, safety, or irreparable resource damage. In other cases, there may be no need to suspend operations and to do so may not be in the public interest.

Comments: Public notice of these proceedings and provisions for public participation was another area of concern. Several respondents felt that Indian tribes and the affected public should have the opportunity to participate in the process including the chance to challenge compliance determinations. One respondent explained that public participation in the noncompliance proceedings, either directly or through appeal procedures, is necessary because an operator's noncompliance can have significant impacts on public lands.

Response: The Department estimates that there will be very few cases of material noncompliance that will actually continue to the point of having a proceeding. The process alone could take a year or more to arrive at a decision. To allow the public to appeal could increase the time involved by an additional year. Given that the public would have had the opportunity to appeal and be involved at both the leasing and operations approval stages, and that noncompliance is primarily a contractual dispute between the Government and the operator, it does not seem that a public appeal opportunity is necessary or would serve a useful purpose.

Comments: A large amount of public concern was evidenced about the manner in which the notice of proceedings would be distributed. Some respondents feared that by giving notice to all lessees, there would be an implication that a non-operating lessee who had transferred his rights to operate on the lease may be held liable for the noncompliance of the operator. Most felt that the lessee should not be ultimately held liable for the noncompliance of the operator, unless the lessee had retained some working

interest. Others expressed the opinion that the penalty for noncompliance, namely the loss of the right to obtain new leases or assignments, is unduly harsh. One respondent recommended that the section be amended to allow appeal outside the Forest Service, to the courts.

Response: The Forest Service, in processing a material noncompliance, will only notify the operator and lessees of record. It seems logical that lessees would like to know when an operator is being processed for material noncompliance regardless of whether the lessee had transferred or assigned all rights to other parties or not. The intent was not to implicate the lessee but to merely notify a lessee of proceedings that may or may not have an impact on the lessee's ability to obtain future leases. As for resolution through the courts, that option is always available to the public. However, the courts traditionally require that appellants exhaust administrative remedies and, because of the Leasing Reform Act requirement, the Department is compelled to establish an administrative process to determine material noncompliance.

Comments: Several comments were received relating to the phrase "come into compliance" used in this section.

Most of those who commented contended that the phrase is too vague and punitive as it implies that complete compliance must be accomplished. They stated that is was not appropriate to tie the dismissal of a material noncompliance proceeding or the withdrawal of a finding that operations were in material noncompliance to a determination that the operations had "come into compliance." These respondents suggested that a material noncompliance proceeding be dismissed as soon as an operator begins measures to come into compliance rather than once the operations have come into compliance. Similarly, these respondents suggested that a finding that operations were in material noncompliance be withdrawn as soon as an operator commenced measures to bring the operations into compliance rather than once compliance had been achieved.

Another respondent suggested that the rule be revised to give the compliance officer the discretion to continue a material noncompliance proceeding even though an operator had come into compliance after the proceeding was instituted. This respondent stated that this would give the operator an incentive to bring his operations into compliance before the initiation of a material noncompliance proceeding.

Response: The final rule can not be revised to provide that a material noncompliance proceeding will be dismissed once an operator has begun taking measures designed to correct the noncompliance. The Leasing Reform Act directs this Department to determine if operations are being conducted which do not in any material respect comply with certain standards or requirements. To implement this provision of the statute, a procedure is needed for determining whether noncompliance is material. If this suggestion was adopted, an entity could forestall a determination as to whether its operations were in material noncompliance by beginning to take any measures that arguably would remedy the noncompliance, irrespective of the effectiveness of those measures or the diligence with which they were pursued. This would not be consistent with the congressional intent to give entities an incentive to carry on their operations in material compliance with reclamation requirements and other standards established for the conduct of those operations.

Nor can the final rule be revised to provide that a material noncompliance finding will be withdrawn as soon as the operator has commenced measures to bring the operations into compliance. The Leasing Reform Act provides that once this Department has determined that the operations are not in material noncompliance, specified entities may not receive further leases or assignments until one of the entities "has complied with" the pertinent standards or requirements. It is not possible for the rule to define the term "come into compliance." The compliance officer will have to consider a number of factors, which will vary from instance to instance, in determining whether operations have come into compliance. Among these are growing seasons and other conditions affecting the operator's ability to comply with requirements established for the conduct of the operations. In addition, the authorized officer would consider the diligence with which the corrective measures are pursued and the likely effectiveness of these measures.

The suggestion to make dismissal of a material noncompliance proceeding optional even though the operator has come into compliance following the initiation of the proceeding also cannot be adopted. This would not be consistent with the Leasing Reform Act which ties an entity's ineligibility to obtain future leases and assignments to a finding that the entity is in material noncompliance with a reclamation requirement or other standard. If the operations are brought into compliance following the initiation of a material noncompliance proceeding, there is no authority to nonetheless determine that an entity is ineligible to receive future leases or assignments.

Section 228.114 Additional Notice of Decisions

The proposed rule provided Forest Service guidance for posting notices for the Bureau of Land Management as required by the Leasing Reform Act.

Comments: About half of the comments on this section were in agreement with the list of activities for which a notice has to be posted, with the offices where the notice is to be posted, and with the keeping of posting dates. One respondent wanted the time period specified for how long a notice had to be posted. Another respondent recommended deletion of the references to posting for a decision to modify or waive a lease stipulation, the public notification of a decision on a surface use plan of operations, and appeal rights. One respondent expressed a desire to be notified when any notice is posted.

Response: The final rule was not revised to reflect these comments. As stated, the intent of this section is to let the public know the Forest Service will post notices required of the Bureau of Land Management by the Leasing Reform Act. The provision does not prevent the posting of any other appropriate notices and other notice provisions apply to the Forest Service under the appeal rules (36 CFR parts 217 and 251, subpart C).

Section 211.18 Appeal of Decisions of Forest Officers

This section revises 36 CFR 211.18 to identify those decisions not appealable.

Comments: The majority of those commenting on this section correctly observed that the rule was revising a section of the regulations that was recently superseded. Among the other comments, it was recommended that legal precedents established by the Interior Board of Land Appeals be honored and that an appeal board common to the Forest Service and the Bureau of Land Management be established.

It was said the only appeals the Forest Service should receive are those involving Forest Service decisions pertaining to land and resource management plans, suitability determinations, objections to leasing a particular tract, denial of surface use, or

those alleging noncompliance with a surface use plan. Some comments requested that the Bureau of Land Management retain as much responsibility for appeals as possible.

Some believed that the public should be allowed to appeal decisions involving suitability determinations and compliance with surface use plans. Others were concerned the public was being allowed too many opportunities for appeal, that the public should focus on the land use planning stage, and that the public should not delay the Forest Service from implementing decisions that have already been scrutinized. Opinion was expressed that individuals who do not avail themselves of public participation opportunities should not be allowed to appeal decisions.

Response: The Department has since published new final rules for appeals at 36 CFR parts 217 and 251, subpart C. These rules adequately provide for appeals of mineral-related decisions and serve the same purpose as suggested in the proposed rule. The suggestions for limiting the scope of Forest Service appeals, limiting appeals to participants, or establishing a separate leasing appeal board were all considered in adoption of the final appeal rules and are considered beyond the scope of this final rule. Therefore, the final rule merely contains a cross reference to the agency's appeal rules.

Part 261—Prohibitions

This section of the proposed rule amended 36 CFR part 261, subpart A, General Prohibitions, by changing "operating plan" to include a surface use plan of operations as provided for in 36 CFR part 228, subpart E.

Comments: No comments were received on this part of the proposed rule.

Response: No changes have been made to this section of the final rule.

Regulatory Impact

These rules have been reviewed under the Department of Agriculture procedures and Executive Order 12291, and it has been determined that these regulations are not major rules. This regulation will not have an effect on the economy of $100 million or more and, in and of itself, will not increase major costs to consumers, geographic regions, industry, or Federal, State, and local agencies. These regulations are essentially procedural and represent little change in current requirements on lessees, assignees, or operators and, therefore, it will not adversely affect competition, employment, investment, productivity, innovation, or the ability of United States based enterprises to compete in foreign markets.

It has also been determined that these rules do not have a significant economic impact on a substantial number of small entities because of its limited scope and application. Therefore, the rules are not subject to review under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Controlling Paperwork Burdens on the Public

It should be noted, that while the requirements of the surface use plan of operations in this rule are new requirements by the Department of Agriculture, the requirements are identical to that now required by the Bureau of Land Management, U.S. Department of the Interior, as part of an Application for Permit to Drill or Sundry Notice and, therefore, will not increase the amount or type of information a lessee will have to submit for operations on National Forest System lands.

The total burden hours on an operator are estimated to be 125 hours annually. These hours are the same as estimated by the Bureau of Land Management in its request for Office of Management and Budget clearance of Forms 3160–3 and 3160–5. These forms were cleared on December 31, 1988, and are assigned clearance numbers 1004–0136 and 1004–0135 respectively. The Bureau of Land Management has requested an extension on the use of these forms. An operator proposing to conduct surface disturbing activities on the National Forest System is required to utilize these existing Bureau of Land Management forms and to submit information required in this rule to the appropriate Bureau of Land Management office.

However, because these requirements will now be levied by the Department of Agriculture, a request for approval of these new reporting requirements has been submitted to, and approved by, the Office of Management and Budget pursuant to 5 CFR part 1320. The assigned clearance number is 0596–0101 which expires on February 29, 1992. In addition, subsequent to publication of the proposed rule, the Forest Service submitted an addendum to this approval to the Office of Management and Budget. The addendum addresses: Consideration of requests to modify, waive, or grant exceptions to lease stipulations; Operators submission of surface use plan of operations; Request for reduction in bond amount after reclamation; Notice of temporary cessation of operations; Extension of deadline in notice of noncompliance, and Petition for withdrawal of find of material noncompliance, which requires additional annual burden hours. The assigned clearance number for all information requirements in this rule is 0596–0101 which expires on February 29, 1992.

Environmental Impact

Based on both experience and environmental analysis, this proposed rule will have no significant effect on the human environment, individually or cumulatively. Therefore, it is categorically excluded from documentation in an environmental assessment or an environmental impact statement (40 CFR 1508.4).

List of Subjects

36 CFR Part 228

Administrative practice and procedure, Environmental protection, Mines, National forests, Oil and gas exploration, Public lands—mineral resources, Public lands—Rights-of-way, Reporting and recordkeeping requirements, Surety bonds, Wilderness areas.

36 CFR Part 261

Law enforcement, National forests.

Therefore, for the reasons set forth in the preamble, parts 228 and 261 of chapter II of title 36 of the Code of Federal Regulations are amended as set out below:

Dated: January 9, 1990.

Clayton Yeutter,

Secretary of Agriculture.

PART 228—MINERALS

1. Revise the authority citation for part 228 to read as follows:

Authority: 30 Stat. 35 and 36, as amended (16 U.S.C. 478, 551); 41 Stat. 437, as amended, sec. 5102(d), 101 Stat. 1330–256 (30 U.S.C. 226); 61 Stat. 914, as amended (30 U.S.C. 352).

2. Add a new subpart E to part 228 to read as follows:

Subpart E—Oil and Gas Resources

Sec.

Subpart E—Oil and Gas Resources

§ 228.100 Scope and applicability.

(a) *Scope.* This subpart sets forth the rules and procedures by which the Forest Service of the United States Department of Agriculture will carry out its statutory responsibilities in the issuance of Federal oil and gas leases and management of subsequent oil and gas operations on National Forest System lands, for approval and modification of attendant surface use plans of operations, for monitoring of surface disturbing operations on such leases, and for enforcement of surface use requirements and reclamation standards.

(b) *Applicability.* The rules of this subpart apply to leases on National Forest System lands and to operations that are conducted on Federal oil and gas leases on National Forest System lands as of April 20, 1990.

(c) *Applicability of other rules.* Surface uses associated with oil and gas prospecting, development, production, and reclamation activities, that are conducted on National Forest System lands outside a leasehold must receive prior authorization from the Forest Service. Such activities are subject to the regulations set forth elsewhere in 36 CFR chapter II, including but not limited to the regulations set forth in 36 CFR parts 251, subpart B, and 261.

§ 228.101 Definitions.

For the purposes of this subpart, the terms listed in this section have the following meaning:

Authorized Forest officer. The Forest Service employee delegated the authority to perform a duty described in these rules. Generally, a Regional Forester, Forest Supervisor, District Ranger, or Minerals Staff Officer, depending on the scope and level of the duty to be performed.

Compliance Officer. The Deputy Chief, or the Associate Deputy Chiefs, National Forest System or the line officer designated to act in the absence of the Deputy Chief.

Leasehold. The area described in a Federal oil and gas lease, communitized, or unitized area.

Lessee. A person or entity holding record title in a lease issued by the United States.

National Forest System. All National Forest lands reserved or withdrawn from the public domain of the United States, all National Forest lands acquired through purchase, exchange, donation, or other means, the National Grasslands and land utilization projects administered under title III of the Bankhead-Jones Farm Tenant Act (7 U.S.C. 1010 *et seq.*), and other lands, waters, or interests therein which are administered by the Forest Service or are designated for administration through the Forest Service as a part of the system (16 U.S.C. 1609).

Notices To Lessees, Transferees, and Operators. A written notice issued by the authorized Forest officer. Notices To Lessees, Transferees, and Operators implement the regulations in this subpart and serve as instructions on specific item(s) of importance within a Forest Service Region, National Forest, or Ranger District.

Onshore Oil and Gas Order. A formal numbered order issued by or signed by the Chief of the Forest Service that implements and supplements the regulations in this subpart.

Operating right. The interest created out of a lease that authorizes the holder of that interest to enter upon the leased lands to conduct drilling and related operations, including production of oil and gas from such lands in accordance with the terms of the lease.

Operating rights owner. A person holding operating rights in a lease issued by the United States. A leasee also may be an operating rights owner if the operating rights in a lease or portion thereof have not been conveyed to another person.

Operations. Surface disturbing activities that are conducted on a leasehold on National Forest System lands pursuant to a current approved surface use plan of operations, including but not limited to, exploration, development, and production of oil and gas resources and reclamation of surface resources.

Operator. Any person or entity, including, but not limited to, the lessee or operating rights owner, who has stated in writing to the authorized Forest officer that they are responsible under the terms and conditions of the lease for the operations conducted on the leased lands or a portion thereof.

Person. An individual, partnership, corporation, association or other legal entity.

Substantial modification. A change in lease terms or a modification, waiver, or exception of a lease stipulation that would require an environmental assessment or environmental impact statement be prepared pursuant to the National Environmental Policy Act of 1969.

Surface use plan of operations. A plan for surface use, disturbance, and reclamation.

Transfer. Any conveyance of an interest in a lease by assignment, sublease or otherwise. This definition includes the terms: "Assignment" which means a conveyance of all or a portion of the lessee's record title interest in a lease; and "sublease" which means a conveyance of a non-record interest in a lease, i.e., a conveyance of operating rights is normally a sublease and a sublease also is a subsidiary arrangement between the lessee (sublessor) and the sublessee, but a sublease does not include a transfer of a purely financial interest, such as overriding royalty interest or payment out of production, nor does it affect the relationship imposed by a lease between the lessee(s) and the United States.

Transferee. A person to whom an interest in a lease issued by the United States has been transferred.

Leasing

§ 228.102 Leasing analyses and decisions.

(a) *Compliance with the National Environmental Policy Act of 1969.* In analyzing lands for leasing, the authorized Forest officer shall comply with the National Environmental Policy Act of 1969, implementing regulations at 43 CFR parts 1500–1508, and Forest Service implementing policies and procedures set forth in Forest Service Manual chapter 1950 and Forest Service Handbook 1909.15.

(b) *Scheduling analysis of available lands.* Within 6 months of April 20, 1990, Forest Supervisors shall develop, in cooperation with the Bureau of Land Management and with public input, a schedule for analyzing lands under their jurisdiction that have not been already analyzed for leasing. The Forest Supervisors shall revise or make additions to the schedule at least annually. In scheduling lands for analysis, the authorized Forest officer shall identify and exclude from further review the following lands which are legally unavailable for leasing:

(1) Lands withdrawn from mineral leasing by an act of Congress or by an order of the Secretary of the Interior;

(2) Lands recommended for wilderness allocation by the Secretary of Agriculture;

(3) Lands designated by statute as wilderness study areas, unless oil and gas leasing is specifically allowed by the statute designating the study area;

(4) Lands within areas allocated for wilderness or further planning in Executive Communication 1504, Ninety-Sixth Congress (House Document No. 96–119), unless such lands subsequently have been allocated to uses other than wilderness by an approved Forest land and resource management plan or have been released to uses other than wilderness by an act of Congress; and,

(5) Roadless areas currently undergoing evaluation pursuant to 36 CFR 219.17.

(c) *Leasing analyses.* The leasing analysis shall be conducted by the authorized Forest officer in accordance with the requirements of 36 CFR part 219 (Forest land and resource management planning) and/or, as appropriate, through preparation of NEPA documents. As part of the analysis, the authorized Forest oficer shall:

(1) Identify on maps those areas that will be:

(i) Open to development subject to the terms and conditions of the standard oil and gas lease form (including an explanation of the typical standards and objectives to be enforced under the standard lease terms);

(ii) Open to development but subject to constraints that will require the use of lease stipulations such as those prohibiting surface use on areas larger than 40 acres or such other standards as may be developed in the plan for stipulation use (with discussion as to why the constraints are necessary and justifiable); and

(iii) Closed to leasing, distinguishing between those areas that are being closed through exercise of management direction, and those closed by law, regulation, etc.

(2) Identify alternatives to the areas listed in paragraph (c)(1) of this section, including that of not allowing leasing.

(3) Project the type/amount of post-leasing activity that is reasonably foreseeable as a consequence of conducting a leasing program consistent with that described in the proposal and for each alternative.

(4) Analyze the reasonable foreseeable impacts of post-leasing activity projected under paragraph (c)(3) of this section.

(d) *Area or Forest-wide leasing decisions (lands administratively available for leasing).* Upon completion of the leasing analysis, the Regional Forest shall promptly notify the Bureau of Land Management as to the area or Forest-wide leasing decisions that have been made, that is, identify lands which have been found administratively available for leasing.

(e) *Leasing decisions for specific lands.* At such time as specific lands are being considered for leasing, the Regional Forester shall review the area or Forest-wide leasing decision and shall authorize the Bureau of Land Management to offer specific lands for lease subject to:

(1) Verifying that oil and gas leasing of the specific lands has been adequately addressed in a NEPA document, and is consistent with the Forest land and resource management plan. If NEPA has not been adequately addressed, or if there is significant new information or circumstances as defined by 40 CFR 1502.9 requiring further environmental analysis, additional environment analysis shall be done before a leasing decision for specific lands will be made. If there is inconsistency with the Forest land and resource management plan, no authorization for leasing shall be given unless the plan is amended or revised.

(2) Ensuring that conditions of surface occupancy identified in § 228.102(c)(1) are properly included as stipulations in resulting leases.

(3) Determining that operations and development could be allowed somewhere on each proposed lease, except where stipulations will prohibit all surface occupancy.

§ 228.103 Notice of appeals of decisions.

The authorized Forest officer shall promptly notify the Bureau of Land Management if appeals of either an area or Forest-wide leasing decision or a leasing decision for specific lands are filed during the periods provided for under 36 CFR part 217.

§ 228.104 Consideration of requests to modify, waive, or grant exceptions to lease stipulations.

(a) *General.* An operator submitting a surface use plan of operations may request the authorized Forest officer to authorize the Bureau of Land Management to modify (permanently change), waive (permanently remove), or grant an exception (case-by-case exemption) to a stipulation included in a lease at the direction of the Forest Service. The person making the request is encouraged to submit any information which might assist the authorized Forest officer in making a decision.

(b) *Review.* The authorized Forest officer shall review any information submitted in support of the request and any other pertinent information.

(1) As part of the review, consistent with 30 U.S.C. 226 (f)–(g), the authorized Forest officer shall ensure compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4331 *et seq.*) and any other applicable laws, and shall ensure preparation of any appropriate environmental documents.

(2) The authorized Forest officer may authorize the Bureau of Land Management to modify, waive, or grant an exception to a stipulation if:

(i) The action would be consistent with applicable Federal laws;

(ii) The action would be consistent with the current forest land and resource management plan;

(iii) The management objectives which led the Forest Service to require the inclusion of the stipulation in the lease can be met without restricting operations in the manner provided for by the stipulation given the change in the present condition of the surface resources involved, or given the nature, location, timing, or design of the proposed operations; and

(iv) The action is acceptable to the authorized Forest officer based upon a review of the environmental consequences.

(c) *Other agency stipulations.* If a stipulation was included in a lease by the Forest Service at the request of another agency, the authorized Forest officer shall consult with that agency prior to authorizing modification, waiver, or exception.

(d) *Notice of decision.* (1) When the review of a stipulation modification, waiver, or exception request has been completed and the authorized Forest officer has reached a decision, the authorized Forest officer shall promptly notify the operator and the appropriate Bureau of Land Management office, in writing, of the decision to grant, or grant with additional conditions, or deny the request.

(2) Any decision to modify, waive, or grant an exception to a lease stipulation shall be subject to administrative appeal only in conjunction with an appeal of a decision on a surface use plan of operation or supplemental surface use plan of operation.

Authorization of Occupancy Within a Leasehold

§ 228.105 Issuance of onshore orders and notices to lessees.

(a) *Onshore oil and gas orders.* The Chief of the Forest Service may issue, or cosign with the Director, Bureau of Land Management, Onshore Oil and Gas Orders necessary to implement and supplement the regulations of this subpart.

(1) *Adoption of Onshore Oil and Gas Order No. 1.* Until such time as another order is adopted and codified in the CFR, operators shall submit surface use plans of operations in accordance with Section III.G.4(b), Guidelines for preparing surface use program, of the Department of the Interior, Bureau of Land Management, Onshore Oil and Gas Order No. 1, 48 FR 48915–30 (Oct. 21, 1983), published as Appendix A to this subpart.

(2) *Adoption of additional onshore oil and gas orders.* Additional onshore oil and gas orders shall be published in the **Federal Register** for public comment and codified in the CFR.

(3) *Applicability of onshore oil and gas orders.* Onshore Oil and Gas Orders issued pursuant to this section are binding on all operations conducted on National Forest System lands, unless otherwise provided therein.

(b) *Notices to lessees, transferees, and operators.* The authorized Forest officer may issue, or cosign with the authorized officer of the Bureau of Land Management, Notices to Lessees, Transferees, and Operators necessary to implement the regulations of this subpart. Notices to Lessees, Transferees, and Operators are binding on all operations conducted on the administrative unit of the National Forest System (36 CFR 200.2) supervised by the authorized Forest officer who issued or cosigned such notice.

§ 228.106 Operator's submission of surface use plan of operations.

(a) *General.* No permit to drill on a Federal oil and gas lease for National Forest System lands may be granted without the analysis and approval of a surface use plan of operations covering proposed surface disturbing activities. An operator must obtain an approved surface use plan of operations before conducting operations that will cause surface disturbance. The operator shall submit a proposed surface use plan of operations as part of an Application for a Permit to Drill to the appropriate Bureau of Land Management office for forwarding to the Forest Service, unless otherwise directed by the Onshore Oil and Gas Order in effect when the proposed plan of operations is submitted.

(b) *Preparation of plan.* In preparing a surface use plan of operations, the operator is encouraged to contact the local Forest Service office to make use of such information as is available from the Forest Service concerning surface resources and uses, environmental considerations, and local reclamation procedures.

(c) *Content of plan.* The type, size, and intensity of the proposed operations and the sensitivity of the surface resources that will be affected by the proposed operations determine the level of detail and the amount of information which the operator includes in a proposed plan of operations. However, any surface use plan of operations submitted by an operator shall contain the information specified by the Onshore Oil and Gas Order in effect when the surface use plan of operations is submitted.

(d) *Supplemental plan.* An operator must obtain an approved supplemental surface use plan of operations before conducting any surface disturbing operations that are not authorized by a current approved surface use plan of operations. The operator shall submit a proposed supplemental surface use plan of operations to the appropriate Bureau of Land Management office for forwarding to the Forest Service, unless otherwise directed by the Onshore Oil and Gas Order in effect when the proposed supplemental plan of operations is submitted. The supplemental plan of operations need only address those operations that differ from the operations authorized by the current approved surface use plan of operations. A supplemental plan is otherwise subject to the same requirements under this subpart as an initial surface use plan of operations.

§ 228.107 Review of surface use plan of operations.

(a) *Review.* The authorized Forest officer shall review a surface use plan of operations as promptly as practicable given the nature and scope of the proposed plan. As part of the review, the authorized Forest officer shall comply with the National Environmental Policy Act of 1969, implementing regulations at 40 CFR Parts 1500–1508, and the Forest Service implementing policies and procedures set forth in Forest Service Manual Chapter 1950 and Forest Service Handbook 1909.15 and shall ensure that:

(1) The surface use plan of operations is consistent with the lease, including the lease stipulations, and applicable Federal laws;

(2) To the extent consistent with the rights conveyed by the lease, the surface use plan of operations is consistent with, or is modified to be consistent with, the applicable current approved forest land and resource management plan;

(3) The surface use plan of operations meets or exceeds the surface use requirements of § 228.108 of this subpart; and

(4) The surface use plan of operations is acceptable, or is modified to be acceptable, to the authorized Forest officer based upon a review of the environmental consequences of the operations.

(b) *Decision.* The authorized Forest officer shall make a decision on the approval of a surface use plan of operations as follows:

(1) If the authorized Forest officer will not be able to make a decision on the proposed plan within 3 working days after the conclusion of the 30-day notice period provided for by 30 U.S.C. 226(f), the authorized Forest officer shall advise the appropriate Bureau of Land Managemnt office and the operator as soon as such delay becomes apparent, either in writing or orally with subsequent written confirmation, that additional time will be needed to process the plan. The authorized Forest officer shall explain the reason why additional time is needed and project the date by which a decision on the plan will likely be made.

(2) When the review of a surface use plan of operations has been completed, the authorized Forest officer shall promptly notify the operator and the appropriate Bureau of Land Management office, in writting, that:

(i) The plan is approved as submitted:

(ii) The plan is approved subject to specified conditions; or,

(iii) The plan is disapproved for the reasons stated.

(c) *Notice of decision.* The authorized Forest officer shall give public notice of the decision on a pan and include in the notice that the decision is subject to appeal under the administrative appeal procedures at 36 CFR parts 217 and 251, subpart C.

(d) *Transmittal of decision.* The authorized Forest officer shall immediately forward a decision on a surface use plan of operations to the appropriate Bureau of Land Management office and the operator. This transmittal shall include the estimated cost of reclamation and restoration (§ 228.109(a)) if the authorized Forest officer believes that additional bonding is required.

(e) *Supplemental plans.* A supplemental surface use plan of operations (§ 228.106(d)) shall be reviewed in the same manner as an initial surface use plan of operations.

§ 228.108 Surface use requirements.

(a) *General.* The operator shall conduct operations on a leasehold on National Forest System lands in a manner that minimizes effects on surface resources, prevents unnecessary

or unreasonable surface resource disturbance, and that is in compliance with the other requirements of this section.

(b) *Notice of operations.* The operator must notify the authorized Forest officer 48 hours prior to commencing operations or resuming operations following their temporary cessation (§ 228.111).

(c) *Access facilities.* The operator shall construct and maintain access facilities to assure adequate drainage and to minimize or prevent damage to surface resources.

(d) *Cultural and historical resources.* The operator shall report findings of cultural and historical resources to the authorized Forest officer immediately and, except as otherwise authorized in an approved surface use plan of operations, protect such resources.

(e) *Fire prevention and control.* To the extent practicable, the operator shall take measures to prevent uncontrolled fires on the area of operation and to suppress uncontrolled fires resulting from the operations.

(f) *Fisheries, wildlife and plant habitat.* The operator shall comply with the requirements of the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*) and its implementing regulations (50 CFR chapter IV), and, except as otherwise provided in an approved surface use plan of operations, conduct operations in such a manner as to maintain and protect fisheries, wildlife, and plant habitat.

(g) *Reclamation.* (1) Unless otherwise provided in an approved surface use plan of operations, the operator shall conduct reclamation concurrently with other operations.

(2) Within 1 year of completion of operations on a portion of the area of operation, the operator must reclaim that portion, unless a different period of time is approved in writing by the authorized Forest officer.

(3) The operator must:

(i) Control soil erosion and landslides;

(ii) Control water runoff;

(iii) Remove, or control, solid wastes, toxic substances, and hazardous substances;

(iv) Reshape and revegetate disturbed areas;

(v) Remove structures, improvements, facilities and equipment, unless otherwise authorized; and

(vi) Take such other reclamation measures as specified in the approved surface use plan of operations.

(h) *Safety measures.* (1) The operator must maintain structures, facilities, improvements, and equipment located on the area of operation in a safe and neat manner and in accordance with an approved surface use plan of operations.

(2) The operator must take appropriate measures in accordance with applicable Federal and State laws and regulations to protect the public from hazardous sites or conditions resulting from the operations. Such measures may include, but are not limited to, posting signs, building fences, or otherwise identifyng the hazardous site or condition.

(i) *Wastes.* The operator must either remove garbage, refuse, and sewage from National Forest System lands or treat and dispose of that material in such a manner as to minimize or prevent adverse impacts on surface resources. The operator shall treat or dispose of produced water, drilling fluid, and other waste generated by the operations in such a manner as to minimize or prevent adverse impacts on surface resources.

(j) *Watershed protection.* (1) Except as otherwise provided in the approved surface use plan of operations, the operator shall not conduct operations in areas subject to mass soil movement, riparian areas and wetlands.

(2) The operator shall take measures to minimize or prevent erosion and sediment production. Such measures include, but are not limited to, siting structures, facilities, and other improvements to avoid steep slopes and excessive clearing of land.

§ 228.109 Bonds.

(a) *General.* As part of the review of a proposed surface use plan of operations, the authorized Forest officer shall consider the estimated cost to the Forest Service to reclaim those areas that would be disturbed by operations and to restore any lands or surface waters adversely affected by the lease operations after the abandonment or cessation of operations on the lease. If at any time prior to or during the conduct of operations, the authorized Forest officer determines the financial instrument held by the Bureau of Land Management is not adequate to ensure complete and timely reclamation and restoration, the authorized Forest officer shall give the operator the option of either increasing the financial instrument held by the Bureau of Land Management or filing a separate instrument with the Forest Service in the amount deemed adequate by the authorizd Forest officer to ensure reclamation and restoration.

(b) *Standards for estimating reclamation costs.* The authorized Forest officer shall consider the costs of the operator's proposed reclamation program and the need for additional measures to be taken when estimating the cost to the Forest Service to reclaim the disturbed area.

(c) *Release of reclamation liability.* An operator may request the authorized Forest officer to notify the Bureau of Land Management of reduced reclamation liability at any time after reclamation has commenced. The authorized Forest officer shall, if appropriate, notify the Bureau of Land Management as to the amount to which the liability has been reduced.

§ 228.110 Indemnification.

The operator and, if the operator does not hold all of the interest in the applicable lease, all lessees and transferees are jointly and severally liable in accordance with Federal and State laws for indemnifying the United States for:

(a) Injury, loss or damage, including fire suppression costs, which the United States incurs as a result of the operations; and

(b) Payments made by the United States in satisfaction of claims, demands or judgments for an injury, loss or damage, including fire suppression costs, which result from the operations.

Administration of Operations

§ 228.111 Temporary cessation of operations.

(a) *General.* As soon as it becomes apparent that there will be a temporary cessation of operations for a period of 45 days or more, the operator must verbally notify and subsequently file a statement with the authorized Forest officer verifying the operator's intent to maintain structures, facilities, improvements, and equipment that will remain on the area of operation during the cessation of operations, and specifying the expected date by which operations will be resumed.

(b) *Seasonal shutdowns.* The operator need not file the statement required by paragraph (a) of this section if the cessation of operations results from seasonally adverse weather conditions and the operator will resume operations promptly upon the conclusion of those adverse weather conditions.

(c) *Interim measures.* The authorized Forest officer may require the operator to take reasonable interim reclamation or erosion control measures to protect surface resources during temporary cessations of operations, including during cessations of operations resulting from seasonally adverse weather conditions.

§ 228.112 Compliance and inspection.

(a) *General.* Operations must be conducted in accordance with the lease, including stipulations made part of the lease at the direction of the Forest

Service, an approved surface use plan of operations, the applicable Onshore Oil and Gas Order (§ 228.105(a)), an applicable Notice to lessees, transferees, and operators (§ 228.105(b)), and regulations of this subpart.

(b) *Completion of reclamation.* The authorized Forest officer shall give prompt written notice to an operator whenever reclamation of a portion of the area affected by surface operations has been satisfactorily completed in accordance with the approved surface use plan of operations and § 228.108 of this subpart. The notice shall describe the portion of the area on which the reclamation has been satisfactorily completed.

(c) *Compliance with other statutes and regulations.* Nothing in this subpart shall be construed to relieve an operator from complying with applicable Federal and State laws or regulations, including, but not limited to:

(1) Federal and State air quality standards, including the requirements of the Clean Air Act, as amended (42 U.S.C. 1857 *et seq.*);

(2) Federal and State water quality standards, including the requirements of the Federal Water Pollution Control Act, as amended (33 U.S.C. 1151 *et seq.*);

(3) Federal and State standards for the use or generation of solid wastes, toxic substances and hazardous substances, including the requirements of the Comprehensive Environmental Response, Compensation and Liability Act, as amended, 42 U.S.C. 9601 *et seq.*, and its implementing regulations, 40 CFR chapter I, subchapter J, and the Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.*, and its implementing regulations, 40 CFR chapter I, subchaper I;

(4) The Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*, and its implementing regulations, 50 CFR chapter IV;

(5) The Archeological Resources Protection Act of 1979, as amended (16 U.S.C. 470aa *et seq.*) and its implementing regulations 36 CFR part 296;

(6) The Mineral Leasing Act of 1920, 30 U.S.C. 1981 et seq., the Mineral Leasing Act of Acquired Lands of 1947, 30 U.S.C. 351 *et seq.*, the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. 1701 *et seq.*, and their implementing regulations, 43 CFR chapter II, group 3100; and

(7) Applicable Onshore Oil and Gas Orders and Notices to Lessees and Operators (NTL's) issued by the United States Department of the Interior, Bureau of Land Management pursuant to 43 CFR chapter II, part 3160, subpart 3164.

(d) *Penalties.* If surface disturbing operations are being conducted that are not authorized by an approved surface use plan of operations or that violate a term or operating condition of an approved surface use plan of operations, the person conducting those operations is subject to the prohibitions and attendant penalties of 36 CFR part 261.

(e) *Inspection.* Forest Service officers shall periodically inspect the area of operations to determine and document whether operations are being conducted in compliance with the regulations in this subpart, the stipulations included in the lease at the direction of the Forest Service, the approved surface use plan of operations, the applicable Onshore Oil and Gas Order, and applicable Notices to Lessees, Transferees, and Operators.

§ 228.113 Notice of noncompliance.

(a) *Issuance.* When an authorized Forest officer finds that the operator is not in compliance with a reclamation or other standard, a stipulation included in a lease at the direction of the Forest Service, an approved surface use plan of operation, the regulations in this subpart, the applicable onshore oil and gas order, or an applicable notice to lessees, transferees, and operators, the authorized Forest officer shall issue a notice of noncompliance.

(1) *Content.* The notice of noncompliance shall include the following:

(i) Identification of the reclamation requirements or other standard(s) with which the operator is not in compliance;

(ii) Description of the measures which are required to correct the noncompliance;

(iii) Specification of a reasonable period of time within which the noncompliance must be corrected;

(iv) If the noncompliance appears to be material, identification of the possible consequences of continued noncompliance of the requirement(s) or standard(s) as described in 30 U.S.C. 226(g);

(v) If the noncompliance appears to be in violation of the prohibitions set forth in 36 CFR part 261, identification of the possible consequences of continued noncompliance of the requirement(s) or standard(s) as described in 36 CFR 261.1b; and

(vi) Notification that the authorized Forest officer remains willing and desirous of working cooperatively with the operator to resolve or remedy the noncompliance.

(2) *Extension of deadlines.* The operator may request an extension of a deadline specified in a notice of noncompliance if the operator is unable to come into compliance with the applicable requirement(s) or standard(s) identified in the notice of noncompliance by the deadline because of conditions beyond the operator's control. The authorized Forest officer shall not extend a deadline specified in a notice of noncompliance unless the operator requested an extension and the authorized Forest officer finds that there was a condition beyond the operator's control, that such condition prevented the operator from complying with the notice of noncompliance by the specified deadline, and that the extension will not adversely affect the interests of the United States. Conditions which may be beyond the operator's control include, but are not limited to, closure of an area in accordance with 36 CFR part 261, subparts B or C, or inaccessibility of an area of operations due to such conditions as fire, flooding, or snowpack.

(3) *Manner of service.* The authorized Forest officer shall serve a notice of noncompliance or a decision on a request for extension of a deadline specified in a notice upon the operator in person, by certified mail or by telephone. However, if notice is initially provided in person or by telephone, the authorized Forest officer shall send the operator written confirmation of the notice or decision by certified mail.

(b) *Failure to come into compliance.* If the operator fails to come into compliance with the applicable requirement(s) or standard(s) identified in a notice of noncompliance by the deadline specified in the notice, or an approved extension, the authorized Forest officer shall decide whether: The noncompliance appears to be material given the reclamation requirements and other standards applicable to the lease established by 30 U.S.C. 226(g), the regulations in this subpart, the stipulations included in a lease at the direction of the Forest Service, an approved surface use plan of operations, the applicable Onshore Oil and Gas Order, or an applicable Notice to lessees, transferees, and operators; the noncompliance is likely to result in danger to public health or safety or irreparable resource damage; and the noncompliance is resulting in an emergency.

(1) *Referral to compliance officer.* When the operations appear to be in material noncompliance, the authorized Forest officer shall promptly refer the matter to the compliance officer. The referral shall be accompanied by a complete statement of the facts supported by appropriate exhibits.

Apparent material noncompliance includes, but is not limited to, operating without an approved surface use plan of operations, conducting operations that have been suspended, failure to timely complete reclamation in accordance with an approved surface use plan of operations, failure to maintain an additional bond in the amount required by the authorized Forest officer during the period of operation, failure to timely reimburse the Forest Service for the cost of abating an emergency, and failing to comply with any term included in a lease, stipulation, or approved surface use plan of operations, the applicable onshore oil and gas order, or an applicable Notice to lessees, transferees, and operators, relating to the protection of a threatened or endangered species.

(2) *Suspension of operations.* When the noncompliance is likely to result in danger to public health or safety or in irreparable resource damage, the authorized Forest officer shall suspend the operations, in whole or in part.

(i) A suspension of operations shall remain in effect until the authorized Forest officer determines that the operations are in compliance with the applicable requirement(s) or standard(s) identified in the notice of noncompliance.

(ii) The authorized Forest officer shall serve decisions suspending operations upon the operator in person, by certified mail, or by telephone. If notice is initially provided in person or by telephone, the authorized Forest officer shall send the operator written confirmation of the decision by certified mail.

(iii) The authorized Forest officer shall immediately notify the appropriate Bureau of Land Management office when an operator has been given notice to suspend operations.

(3) *Abatement of emergencies.* When the noncompliance is resulting in an emergency, the authorized Forest officer may take action as necessary to abate the emergency. The total cost to the Forest Service of taking actions to abate an emergency becomes an obligation of the operator.

(i) Emergency situations include, but are not limited to, imminent dangers to public health or safety or irreparable resource damage.

(ii) The authorized Forest officer shall promptly serve a bill for such costs upon the operator by certified mail.

§ 228.114 Material noncompliance proceedings.

(a) *Evaluation of referral.* The compliance officer shall promptly evaluate a referral made by the authorized Forest officer pursuant to § 228.113(b)(1) of this subpart.

(b) *Dismissal of referral.* The compliance officer shall dismiss the referral if the compliance officer determines that there is not adequate evidence to support a reasonable belief that:

(1) The operator was not in compliance with the applicable requirement(s) or standard(s) identified in a notice of noncompliance by the deadline specified in the notice, or an extension approved by the authorized Forest officer; or

(2) The noncompliance with the applicable requirement(s) or standard(s) identified in the notice of noncompliance may be material.

(c) *Initiation of proceedings.* The compliance officer shall initiate a material noncompliance proceeding if the compliance officer agrees that there is adequate evidence to support a reasonable belief that an operator has failed to come into compliance with the applicable requirement(s) or standard(s) identified in a notice of noncompliance by the deadline specified in the notice, or extension approved by the authorized Forest officer, and that the noncompliance may be material.

(1) *Notice of proceedings.* The compliance officer shall inform the lessee and operator of the material noncompliance proceedings by certified mail, return receipt requested.

(2) *Content of notice.* The notice of the material noncompliance proceeding shall include the following:

(i) The specific reclamation requirement(s) or other standard(s) of which the operator may be in material noncompliance;

(ii) A description of the measures that are required to correct the violation;

(iii) A statement that if the compliance officer finds that the operator is in material noncompliance with a reclamation requirement or other standard applicable to the lease, the Secretary of the Interior will not be able to issue new leases or approve new transfers of leases to the operator, any subsidiary or affiliate of the operator, or any person controlled by or under common control with the operator until the compliance officer finds that the operator has come into compliance with such requirement or standard; and

(iv) A recitation of the specific procedures governing the material noncompliance proceeding set forth in paragraphs (d) through (g) of this section.

(d) *Answer.* Within 30 calendar days after receiving the notice of the proceeding, the operator may submit, in person, in writing, or through a representative, an answer containing information and argument in opposition to the proposed material noncompliance finding, including information that raises a genuine dispute over the material facts. In that submission, the operator also may:

(1) Request an informal hearing with the compliance officer; and

(2) Identify pending administrative or judicial appeal(s) which are relevant to the proposed material noncompliance finding and provide information which shows the relevance of such appeal(s).

(e) *Informal hearing.* If the operator requests an informal hearing, it shall be held within 20 calendar days from the date that the compliance officer receives the operator's request.

(1) The compliance officer may postpone the date of the informal hearing if the operator requests a postponement in writing.

(2) At the hearing, the operator, appearing personally or through an attorney or another authorized representative, may informally present and explain evidence and argument in opposition to the proposed material noncompliance finding.

(3) A transcript of the informal hearing shall not be required.

(f) *Additional procedures as to disputed facts.* If the compliance officer finds that the answer raises a genuine dispute over facts essential to the proposed material noncompliance finding, the compliance officer shall so inform the operator by certified mail, return receipt requested. Within 10 days of receiving this notice, the operator may request a fact-finding conference on those disputed facts.

(1) The fact-finding conference shall be scheduled within 20 calendar days from the date the compliance officer receives the operator's request, unless the operator and compliance officer agree otherwise.

(2) At the fact-finding conference, the operator shall have the opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront the person(s) the Forest Service presents.

(3) A transcribed record of the fact-finding conference shall be made, unless the operator and the compliance officer by mutual agreement waive the requirement for a transcript. The transcript will be made available to the operator at cost upon request.

(4) The compliance officer may preside over the fact-finding conference or designate another authorized Forest officer to preside over the fact-finding conference.

(5) Following the fact-finding conference, the authorized Forest officer who presided over the conference shall promptly prepare written findings of fact based upon the preponderance of the evidence. The compliance officer may reject findings of fact prepared by another authorized Forest officer, in whole or in part, if the compliance officer specifically determines that such findings are arbitrary and capricious or clearly erroneous.

(g) *Dismissal of proceedings.* The compliance officer shall dismiss the material noncompliance proceeding if, before the compliance officer renders a decision pursuant to paragraph (h) of this section, the authorized Forest officer who made the referral finds that the operator has come into compliance with the applicable requirements or standards identified in the notice of proceeding.

(h) *Compliance officer's decision.* The compliance officer shall base the decision on the entire record, which shall consist of the authorized Forest officer's referral and its accompanying statement of facts and exhibits, information and argument that the operator provided in an answer, any information and argument that the operator provided in an informal hearing if one was held, and the findings of fact if a fact-finding conference was held.

(1) *Content.* The compliance officer's decision shall state whether the operator has violated the requirement(s) or standard(s) identified in the notice of proceeding and, if so, whether that noncompliance is material given the requirements of 30 U.S.C. 226(g), the stipulations included in the lease at the direction of the Forest Service, the regulations in this subpart or an approved surface use plan of operations, the applicable onshore oil and gas order, or an applicable notice to lessees, transferees, and operators. If the compliance officer finds that the operator is in material noncompliance, the decision also shall:

(i) Describe the measures that are required to correct the violation;

(ii) Apprise the operator that the Secretary of the Interior is being notified that the operator has been found to be in material noncompliance with a reclamation requirement or other standard applicable to the lease; and

(iii) State that the decision is the final administrative determination of the Department of Agriculture.

(2) *Service.* The compliance officer shall serve the decision upon the operator by certified mail, return receipt requested. If the operator is found to be in material noncompliance, the compliance officer also shall immediately send a copy of the decision to the appropriate Bureau of Land Management office and to the Secretary of the Interior.

(i) *Petition for withdrawal of finding.* If an operator who has been found to be in material noncompliance under the provisions of this section believes that the operations have subsequently come into compliance with the applicable requirement(s) or standard(s) identified in the compliance officer's decision, the operator may submit a written petition requesting that the material noncompliance finding be withdrawn. The petition shall be submitted to the authorized Forest officer who issued the operator the notice of noncompliance under § 228.113(a) of this subpart and shall include information or exhibits which shows that the operator has come into compliance with the requirement(s) or standard(s) identified in the compliance officer's decision.

(1) *Response to petition.* Within 30 calendar days after receiving the operator's petition for withdrawal, the authorized Forest officer shall submit a written statement to the compliance officer as to whether the authorized Forest officer agrees that the operator has come into compliance with the requirement(s) or standard(s) identified in the compliance officer's decision. If the authorized Forest officer disagrees with the operator, the written statement shall be accompanied by a complete statement of the facts supported by appropriate exhibits.

(2) *Additional procedures as to disputed material facts.* If the compliance officer finds that the authorized Forest officer's response raises a genuine dispute over facts material to the decision as to whether the operator has come into compliance with the requirement(s) or standard(s) identified in the compliance officer's decision, the compliance officer shall so notify the operator and authorized Forest officer by certified mail, return receipt requested. The notice shall also advise the operator that the fact finding procedures specified in paragraph (f) of this section apply to the compliance officer's decision on the petition for withdrawal.

(3) *Compliance officer's decision.* The compliance officer shall base the decision on the petition on the entire record, which shall consist of the operator's petition for withdrawal and its accompanying exhibits, the authorized Forest officer's response to the petition and, if applicable, its accompanying statement of facts and exhibits, and if a fact-finding conference was held, the findings of fact. The compliance officer shall serve the decision on the operator by certified mail.

(i) If the compliance officer finds that the operator remains in violation of requirement(s) or standard(s) identified in the decision finding that the operator was in material noncompliance, the decision on the petition for withdrawal shall identify such requirement(s) or standard(s) and describe the measures that are required to correct the violation(s).

(ii) If the compliance officer finds that the operator has subsequently come into compliance with the requirement(s) or standard(s) identified in the compliance officer's decision finding that the operator was in material noncompliance, the compliance officer also shall immediately send a copy of the decision on the petition for withdrawal to the appropriate Bureau of Land Management office and notify the Secretary of the Interior that the operator has come into compliance.

(j) *List of operators found to be in material noncompliance.* The Deputy Chief, National Forest System, shall compile and maintain a list of operators who have been found to be in material noncompliance with reclamation requirements and other standards as provided in 30 U.S.C. 226(g), the regulations in this subpart, a stipulation included in a lease at the direction of the Forest Service, or an approved surface use plan of operations, the applicable onshore oil and gas order, or an applicable notice to lessees, transferees, and operators, for a lease on National Forest System lands to which such standards apply. This list shall be made available to Regional Foresters, Forest Supervisors, and upon request, members of the public.

§ 228.115 Additional notice of decisions.

(a) The authorized Forest officer shall promptly post notices provided by the Bureau of Land Management of:

(1) Competitive lease sales which the Bureau plans to conduct that include National Forest System lands;

(2) Substantial modifications in the terms of a lease which the Bureau proposes to make for leases on National Forest System lands; and

(3) Applications for permits to drill which the Bureau has received for leaseholds located on National Forest System lands.

(b) The notice shall be posted at the offices of the affected Forest Supervisor and District Ranger in a prominent location readily accessible to the public.

(c) The authorized Forest officer shall keep a record of the date(s) the notice

was posted in the offices of the affected Forest Supervisor and District Ranger.

(d) The posting of notices required by this section are in addition to the requirements for public notice of decisions provided in § 228.104(d) (Notice of decision) and § 228.107(c) (Notice of decision) of this subpart.

§ 228.116 Information collection requirements.

(a) *Sections containing information requirements.* The following sections of this subpart contain information requirements as defined in 5 CFR part 1320 and have been approved for use by the Office of Management and Budget:

(1) Section 228.104(a) Requests to Modify, Waive, or Grant Exceptions to Leasing Stipulations;

(2) Section 228.106 (a), (c), and (d) Submission of Surface Use Plan of Operations;

(3) Section 228.109(c) Request for Reduction in Reclamation Liability after Reclamation;

(4) Section 228.111(a) Notice of Temporary Cessation of Operations;

(5) Section 228.113(a)(2) Extension of Deadline in Notice of Noncompliance; and

(6) Section 228.114 (c) through (i) Material Noncompliance Proceedings.

(b) *OMB control number.* The information requirements listed in paragraph (a) of this section have been assigned OMB Control No. 0596–0101.

(c) *Average estimated burden hours.* (1) The average burden hours per response are estimated to be:

(i) 5 minutes for the information requirements in § 228.104(a) of this subpart;

(ii) No additional burden hours required to meet the information requirements in § 228.106 (a), (c), and (d) of this subpart;

(iii) 10 minutes for the information requirements in § 228.109(c) of this subpart;

(iv) 10 minutes for the information requirements in § 228.111(a) of this subpart;

(v) 5 minutes for the information requirements in § 228.113(a)(2) of this subpart; and

(vi) 2 hours for the information requirements in § 228.114 (c) through (i) of this subpart.

(2) Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Chief (2800), Forest Service, USDA, P.O. Box 96090, Washington, DC 20090–6090 and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

Appendix A to Subpart E—Guidelines for Preparing Surface Use Plans of Operation for Drilling

I. Components of a Complete Application for Permit to Drill

(a) Guidelines for Preparing Surface Use Program. In preparing this program, the lessee or operator shall submit maps, plats, and narrative descriptions which adhere closely to the following (maps and plats should be of a scale no smaller than 1:24,000 unless otherwise stated below):

(1) *Existing Roads.* A legible map (USGS topographic, county road, Alaska Borough, or other such map), labeled and showing the access route to the location, shall be used for locating the proposed well site in relation to a town (village) or other locatable point, such as a highway or county road, which handles the majority of the through traffic to the general area. The proposed route to the location, including appropriate distances from the point where the access route exits established roads, shall be shown. All access roads shall be appropriately labeled. Any plans for improvement and/or a statement that existing roads will be maintained in the same or better condition shall be provided. Existing roads and newly constructed roads on surface under the jurisdiction of a Surface Management Agency shall be maintained in accordance with the standards of the Surface Management Agency.

Information required by items (2), (3), (4), (5), (6), and (8) of this subsection also may be shown on this map if appropriately labeled or on a separate plat or map.

(2) *Access Roads to Be Constructed and Reconstructed.* All permanent and temporary access roads that are to be constructed, or reconstructed, in connection with the drilling of the proposed well shall be appropriately identified and submitted on a map or plat. Width, maximum grade, major cuts and fills, turnouts, drainage design, location and size of culverts and/or bridges, fence cuts and/or cattleguards, and type of surfacing material, if any, shall be stated for all construction. In addition, where permafrost exists, the methods for protection from thawing must be indicated. Modification of proposed road design may be required during the onsite inspection.

Information also should be furnished to indicate where existing facilities may be altered or modified. Such facilities include gates, cattleguards, culverts, and bridges which, if installed or replaced, shall be designed to adequately carry anticipated loads.

(3) *Location of Existing Wells.* It is recommended that this information be submitted on a map or plat and include all wells (water, injection or disposal, producing, and drilling) within a 1-mile radius of the proposed location.

(4) *Location of Existing and/or Proposed Facilities if Well is Productive.*

(i) On well pad—A map or plat shall be included showing, to the extent known or anticipated, the location of all production facilities and lines to be installed if the well is successfully completed for production.

(ii) Off well pad—A map or plat shall be included showing to the extent known or anticipated, the existing or new production facilities to be utilized and the lines to be installed if the well is successfully completed for production. If new construction, the dimensions of the facility layout are to be shown.

If the information required under (a) or (b) above is not known and cannot be accurately presented and the well subsequently is completed for production, the operator shall then comply with section IV of this Order.

(5) *Location and Type of Water Supply (Rivers, Creeks, Springs, Lakes, Ponds, and Wells).* This information may be shown by quarter-quarter section on a map or plat, or may be a written description. The source and transportation method for all water to be used in drilling the proposed well shall be noted if the source is located on Federal or Indian lands or if water is to be used from a Federal or Indian project. If the water is obtained from other than Federal or Indian lands, only the location need be identified. Any access roads crossing Federal or Indian lands that are needed to haul the water shall be described in items G.4.b. (1) and (2), as appropriate. If a water supply well is to be drilled on the lease, it shall be so stated under this item, and the authorized officer of the BLM may require the filing of a separate APD.

(6) *Construction Materials.* The lessee or operator shall state the character and intended use of all construction materials such as sand, gravel, stone and soil material. If the materials to be used are Federally-owned, the proposed source shall be shown by either quarter-quarter section on a map or plat, or a written description. The use of materials under BLM jurisdiction is governed by 43 CFR 3610.2–3. The authorized officer shall inform the lessee or operator if the materials may be used free of charge or if an application for sale is required. If the materials to be used are Indian owned or under the jurisdiction of any Surface Management Agency other than BLM, the specific tribe and or Area Superintendent of BIA, or the appropriate Surface Management Agency office shall be contacted to determine the appropriate procedure for use of the materials.

(7) *Methods for Handling Waste Disposal.* A written description shall be given of the methods and locations proposed for safe containment and disposal of each type of waste material (e.g., cuttings, garbage, salts, chemicals, sewage, etc.) that results from the drilling of the proposed well. Likewise, the narrative shall include plans for the eventual disposal of drilling fluids and any produced oil or water recovered during testing operations.

(8) *Ancillary Facilities.* The plans, or subsequent amendments to such plans, shall identify all ancillary facilities such as camps and airstrips as to their location, land area required, and the methods and standards to be employed in their construction. Such facilities shall be shown on a map or plat. The approximate center of proposed camps and the center line of airstrips shall be staked on the ground.

(9) *Well Site Layout.* A plat of suitable scale (not less than 1 inch = 50 feet) showing

the proposed drill pad and its location with respect to topographic features is required. Cross section diagrams of the drill pad showing any cuts and fills and the relation to topography are also required. The plat shall also include the approximate proposed location of the reserve and burn pits, access roads onto the pad, turnaround areas, parking area, living facilities, soil material stockpiles, and the orientation of the rig with respect to the pad and other facilities. Plans, if any to line the reserve pit should be detailed.

(10) *Plans for Reclamation of the Surface.* The program for surface reclamation upon completion of the operation, such as configuration of the reshaped topography, drainage system, segregation of spoil materials, surface manipulations, waste disposal, revegetation methods, and soil treatments, plus other practices necessary to reclaim all disturbed areas, including any access roads or portions of well pads when no longer needed, shall be stated. An estimate of the time for commencement and completion of reclamation operations, dependent on weather conditions and other local uses of the area, shall be provided.

(11) *Surface Ownership.* The surface ownership (Federal, Indian, State or private) at the well location, and for all lands crossed by roads which are to be constructed or upgraded, shall be indicated. Where the surface of the well site is privately owned, the operator shall provide the name, address, and telephone number of the surface owner, unless previously provided.

(12) *Other Information.* The lessee or operator is encouraged to submit any additional information that may be helpful in processing the application.

(13) *Lessee's or Operator's Representative and Certification.* The name, address, and telephone number of the lessee's or operator's field representative shall be included. The lessee or operator submitting the APD shall certify as follows:

I hereby certify that I, or persons under my direct supervision, have inspected the proposed drill site and access route; that I am familiar with the conditions which currently exist; that the statements made in this plan are, to the best of my knowledge, true and correct; and that the work associated with operations proposed herein will be performed by _____ and its contractors and subcontractors in conformity with this plan and the terms and conditions under which it is approved. This statement is subject to the provisions of 18 U.S.C. 1001 for the filing of a false statement.

Date _____

Name and Title _____

PART 261—PROHIBITIONS

3. The authority citation for part 261 continues to read as follows:

Authority: 16 U.S.C. 551; 16 U.S.C. 472; 7 U.S.C. 1011(f); 16 U.S.C. 1246(i); 16 U.S.C. 1133(c)-(d)(1).

Subpart A—General Prohibitions

4. Amend § 261.2 by adding a new definition in alphabetical sequence to read as follows:

§ 261.2 Definitions.

* * * * *

"*Operating plan*" means a plan of operations as provided for in 36 CFR part 228, subpart A, and a surface use plan of operations as provided for in 36 CFR part 228, subpart E.

* * * * *

[FR Doc. 90-6244 Filed 3-20-90; 8:45 am]

BILLING CODE 3410-11-M

POSTAL SERVICE

39 CFR Parts 775 and 776

Amendments to Environmental Procedures and Procedures for Floodplain Management and Protection of Wetlands

AGENCY: Postal Service.

ACTION: Final rule.

SUMMARY: The rule amends part 775 to clarify, update, and in some respects extend the situations in which the Postal Service does not prepare environmental assessments under its facilities program. The revised exclusions draw on experiences over the past five years with numerous facility projects and accommodate new acquisition techniques such as advance site acquisitions.

Certain changes are also made in the Postal Service's facility planning procedures for floodplains and wetlands (part 776), but these changes do not change the scope or level of review required.

EFFECTIVE DATE: April 20, 1990.

FOR FURTHER INFORMATION CONTACT: Edward Wandelt, (202) 268-3135.

SUPPLEMENTARY INFORMATION: On August 22, 1989, the Postal Service published for comment a proposed rule amending its facility planning procedures concerning the circumstances in which environmental assessments are done and updating terminology and other minor details of wetlands regulations. The changes are explained in detail in the preamble published with the proposed rule. The proposed amendments are now adopted with minor corrections and adjustments.

Comments on the proposed rule were received from the Federal Emergency Management Agency (FEMA) and the Council on Environmental Quality (CEQ). FEMA posed two questions about the regulations. FEMA pointed out that floodplain review requirements will still apply to facility projects receiving categorical exclusion from the preparation of an Environmental Assessment under the revised procedures, and asked how those projects will be picked up for review. Under Postal Service procedures, all facility construction projects no matter how large or small, including those excluded from having an Environmental Assessment prepared, require a floodplain evaluation pursuant to 39 CFR 776.3.

FEMA also pointed out that action to identify and minimize harmful impacts is required when building in a floodplain is found necessary, and asked about the meaning of § 776.5(h) when it says that the Facilities Service Center Director "may provide instructions for mandatory measures to be accomplished during design and construction to minimize harm to the floodplain or wetland." The permissive part of this language relates only to the content of instructions issued by the particular official indicated, the Director. Sections 776.5(b)(5) and 776.5(j) specifically require that minimization measures be included as part of the project design in the case of facilities in or affecting floodplains or wetlands.

The Postal Service received a response from the Council on Environmental Quality (CEQ), commenting on several aspects of the proposed rule. These comments are addressed in the following paragraphs.

Square footage. Several of CEQ's comments are related to categorical exclusions that apply to actions involving buildings of a size smaller than a stated number of net interior square feet. First, CEQ requested that the Postal Service address the relationship between square footage of structures and potential for environmental impacts, in order to provide further substantiation for the revised list of categorical exclusions.

Although the proposed rule extends a threshold based upon square footage to additional categorical exclusions, the concept of categorical exclusions limited by interior net square feet is not new to the regulations. Current categorical exclusions for new construction (§ 775.4(b)(1)), expansion and improvement projects (§ 775.4(b)(2)), and purchase or lease of existing buildings (§ 775.4(b)(3)) contain limitations based upon net interior size.

The concept underlying these exclusions, that projects involving relatively small structures are unlikely to have environmental impacts, is based primarily on the fact that projects involving small buildings do not represent major federal actions, and usually involve construction and other activities that are quite similar to those undertaken at many nearby properties.